

Journal of Cellular Biochemistry



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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-NM-92-AD; Amendment 39-11169; AD 99-10-16]

RIN 2120-AA64

Airworthiness Directives; Mitsubishi Model YS-11 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Mitsubishi Model YS-11 series airplanes, that requires repetitive inspections to detect fatigue cracking in the manhole doublers of the lower wing panels; and repair, if necessary. This amendment also requires eventual modification of screw holes in the manhole doublers of the lower wing panels, which constitutes terminating action for the repetitive inspections required by this AD. This amendment is prompted by the issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by this AD are intended to prevent fatigue cracking in the manhole doublers of the lower wing panels, which could result in failure of the wing structure.

DATES: Effective June 22, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 22, 1999.

ADDRESSES: The service information referenced in this AD may be obtained from Mitsubishi Heavy Industries, Ltd., 10 Oye-cho, Minato-ku, Nagoya 455, Japan. This information may be examined at the Federal Aviation

Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Jon Mowery, Aerospace Engineer, Airframe Branch, ANM-120L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712-4137; telephone (562) 627-5322; fax (562) 627-5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Mitsubishi Model YS-11 series airplanes was published in the **Federal Register** on July 9, 1998 (63 FR 37080). That action proposed to require repetitive inspections to detect fatigue cracking in the manhole doublers of the lower wing panels; and repair, if necessary. That action also proposed to require eventual modification of screw holes in the manhole doublers of the lower wing panels.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Request To Accept Modification as Terminating Action

Two commenters request that modification of the screw holes in the manhole doublers of the lower wing panels, as described in NAMC Service Bulletin 57-77, Revision 2, dated September 14, 1994, and specified in paragraph (b) of the proposed AD, be considered terminating action for the repetitive inspections described in paragraph (a) of the proposed rule. "NOTE 2" of the proposed AD states, "Accomplishment of the modification specified in paragraph (b) does not constitute terminating action for the repetitive inspections of paragraph (a)." The commenters state that repetitive inspections of the screw holes in the manhole doublers of the lower wing

panels are no longer necessary after accomplishment of the modification, though inspection of the rivet holes in the skin around the manhole, as specified in SID Item 57-00-03, is still necessary.

The FAA concurs with the commenters' request to accept the modification as terminating action for the repetitive inspections. The FAA has reviewed Mitsubishi NAMC Service Bulletin 57-77, Revision 2, and SID Item 57-00-03, and finds that repetitive inspections of the screw holes in the manhole doublers of the lower wing panels are no longer necessary after accomplishment of the modification specified in the service bulletin. Therefore, paragraph (b) of this final rule has been revised to eliminate reference to repair of any cracking detected during repetitive inspections performed after accomplishment of the modification, and to state that accomplishment of such modification terminates the repetitive inspection requirement of this AD. In addition, a reference to the modification as terminating action for the repetitive inspections has been added to the "Summary" section of this final rule. Also, "NOTE 2" of this final rule has been revised to state, "Mitsubishi NAMC Supplemental Inspection Document (SID) Item 57-00-03 describes inspections of certain rivet holes in the skin around the manhole. Accomplishment of the modification specified in paragraph (b) of this AD does not eliminate the need for the inspections specified in that SID item."

Request To Revise Address for Obtaining Service Information

One commenter requests that the proposed rule be revised to reference the correct address from which service information may be obtained. The commenter points out that Mitsubishi Heavy Industries, not Nihon Aeroplane Manufacturing Company (NAMC) (which was referenced as the appropriate source for the service information specified in the proposal), provides technical publications for owners and operators of Mitsubishi Model YS-11 series airplanes. The FAA concurs with the commenter's request and has revised this final rule to reference the correct address.

Request To Revise Information From NAMC Structural Inspection Document

Two commenters request that the proposed AD be revised to more accurately reflect the information in NAMC Supplemental Inspection Document (SID) Item 57-00-03. The commenters point out that the following statement in the preamble of the proposed AD under the heading "Differences Between Proposed Rule, Service Information, and Japanese Airworthiness Directive" is incorrect: "Following accomplishment of the modification described in the service bulletin, the SID item specifies that the repetitive interval is reduced to 6,000 flight cycles." One of the commenters attributes the misstatement in the proposed AD to a misunderstanding of a transmittal letter that accompanied the SID. That commenter states that the change in repetitive inspection interval referenced by the transmittal letter is for a different inspection item within the SID (Inspection Item 57-00-06), and the repetitive interval for the inspection in SID Item 57-00-03 remains at 8,000 flight cycles.

The FAA acknowledges that the proposed AD could have more accurately reflected the information in SID Item 57-00-03. However, the proposed AD is unaffected by the statement in the preamble. Because the section of the preamble that discusses the reduction of the repetitive interval is not repeated in the final rule, no change to the final rule is necessary in this regard.

Request To Revise Information From Japanese Airworthiness Directive

One commenter requests that the proposed rule be revised to reflect the correct compliance date for the modification as specified in Japanese Airworthiness Directive TCD-3795-2-96, dated December 13, 1996. Under the heading "Differences Between Proposed Rule, Service Information, and Japanese Airworthiness Directive," the proposed rule states, " * * * the Japanese airworthiness directive specifies that modification of the screw holes in the manhole doublers of the lower wing panels be accomplished prior to the accumulation of 60,000 total flight cycles, or before December 13, 2000 (four years after the effective date of the Japanese airworthiness directive), whichever occurs later." The commenter states that, due to a mistranslation in the English version of the AD, the date for required compliance is incorrect. The commenter goes on to state that the correct compliance date should be February 7,

1997, which is four years after the effective date of the original Japanese airworthiness directive (TCD-3795-93, dated February 7, 1993). The FAA acknowledges that a mistranslation of the Japanese airworthiness directive occurred. However, the proposed AD is unaffected by the statement in the preamble. Because the subject section of the proposed rule is not restated in the final rule, no change to the final rule is necessary in this regard.

Request To Increase Repetitive Inspection Interval

One commenter requests that the repetitive inspection interval be increased from 6,000 flight cycles, as specified in paragraph (a) of the proposed AD, to 8,000 flight cycles. As described previously, the commenter points out that SID Item 57-00-03 recommends a repetitive inspection interval of 8,000 flight cycles.

The FAA does not concur with the commenter's request to increase the repetitive inspection interval from 6,000 to 8,000 flight cycles. In developing an appropriate compliance time for this AD, the FAA considered not only the repetitive inspection interval specified in SID Item 57-00-03, but also the degree of urgency associated with addressing the subject unsafe condition (fatigue cracking in the manhole doublers of the lower wing panels, which could result in failure of the wing structure). In light of these factors, as well as engineering judgement and experience, the FAA has determined that, due to the safety implications and consequences associated with the identified unsafe condition, a repetitive inspection interval that is more conservative than the 8,000-flight-cycle interval recommended by SID Item 57-00-03 is warranted. The FAA finds that an interval of 6,000 flight cycles will better ensure that any cracking of the manhole doublers of the lower wing panels is detected and corrected in a timely manner. No change to the final rule is necessary in this regard.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes described previously. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

The FAA estimates that 25 airplanes of U.S. registry will be affected by this AD.

It will take approximately 30 work hours per airplane to accomplish the required inspection, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the inspection required by this AD on U.S. operators is estimated to be \$45,000, or \$1,800 per airplane, per inspection cycle.

It will take approximately 40 work hours per airplane to accomplish the required modification, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the modification required by this AD on U.S. operators is estimated to be \$60,000, or \$2,400 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation

Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

99-10-16 Mitsubishi Heavy Industries, Ltd.: Amendment 39-11169. Docket 97-NM-92-AD.

Applicability: All Model YS-11 series airplanes, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue cracking in the manhole doublers of the lower wing panels, which could result in failure of the wing structure, accomplish the following:

Initial and Repetitive Inspections

(a) Perform a visual inspection to detect cracking in the manhole doublers and around the screw holes of the lower wing panels, in accordance with Mitsubishi Nihon Aeroplane Manufacturing Company (NAMC) Service Bulletin 57-77, Revision 2, dated September 14, 1994, at the time specified in either paragraph (a)(1) or (a)(2) of this AD, as applicable. Repeat the inspection thereafter at intervals not to exceed 6,000 flight cycles.

(1) For airplanes that have accumulated fewer than 45,000 total flight cycles as of the effective date of this AD: Prior to the accumulation of 45,000 total flight cycles, or within 1 year after the effective date of this AD, whichever occurs later, perform the initial inspection.

(2) For airplanes that have accumulated 45,000 or more total flight cycles as of the effective date of this AD: Within 2,000 flight cycles or 1 year after the effective date of this AD, whichever occurs first, perform the initial inspection.

Modification

(b) Modify the screw holes in the manhole doublers of the lower wing panels, in accordance with Mitsubishi NAMC Service Bulletin 57-77, Revision 2, dated September

14, 1994, at the applicable time specified in either paragraph (b)(1) or (b)(2) of this AD. Accomplishment of such modification constitutes terminating action for the repetitive inspections required by paragraph (a) of this AD.

Note 2: Mitsubishi NAMC Supplemental Inspection Document (SID) Item 57-00-03 describes inspections of certain rivet holes in the skin around the manhole. Accomplishment of the modification specified in paragraph (b) of this AD does not eliminate the need for the inspections specified in that SID item.

(1) If no cracking is found, prior to the accumulation of 60,000 total flight cycles, or within 1 year after the effective date of this AD, whichever occurs later, accomplish the modification in accordance with the service bulletin.

(2) If any cracking is found, prior to further flight, repair the cracking and accomplish the modification, in accordance with the service bulletin.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

Special Flight Permits

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(e) The inspection and modification shall be done in accordance with Mitsubishi Nihon Aeroplane Manufacturing Company (NAMC) Service Bulletin 57-77, Revision 2, dated September 14, 1994, which contains the following list of effective pages:

Page number	Revision level shown on page	Date shown on page
1-3	2	September 14, 1994.
4-16	1	November 4, 1993.
17, 18	Original	January 8, 1993.

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Mitsubishi Heavy Industries, Ltd., 10 Oye-cho, Minato-ku, Nagoya 455, Japan. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the

FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 4: The subject of this AD is addressed in Japanese airworthiness directive TCD-3795-2-96, dated December 13, 1996.

(f) This amendment becomes effective on June 22, 1999.

Issued in Renton, Washington, on May 7, 1999.

D. L. Riggins,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.
[FR Doc. 99-12098 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-ANE-58-AD; Amendment 39-11173; AD 99-11-02]

RIN 2120-AA64

Airworthiness Directives; Pratt & Whitney R-1340 Series Reciprocating Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to Pratt & Whitney R-1340 series reciprocating engines, that requires initial and repetitive visual and fluorescent penetrant inspections of cylinders for head cracking. This amendment is prompted by reports of cylinder head cracking. The actions specified by this AD are intended to prevent cylinder head cracking, which can result in engine power loss, forced landing, and damage to the aircraft.

DATES: Effective July 19, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 19, 1999.

ADDRESSES: The service information referenced in this AD may be obtained from Pratt & Whitney, Publications Department, Supervisor Technical Publications Distribution, M/S 132-30, 400 Main Street, East Hartford, CT 06108; telephone (860) 565-7700, fax (860) 565-4503. This information may be examined at the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the

Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Wego Wang, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803-5299; telephone (781) 238-7134, fax (781) 238-7199.

SUPPLEMENTARY INFORMATION:

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to Pratt & Whitney (PW) R-1340 series reciprocating engines was published in the **Federal Register** on June 12, 1998 (63 FR 32151). That action proposed to require initial and repetitive visual inspections of cylinders in accordance with PW Service Bulletin (SB) No. 1787, dated September 7, 1983, for head cracking at intervals based upon whether the engines are cowled and baffled, or unbaffled installations. Cracked cylinder heads must be replaced with serviceable parts if found cracked. In addition, this AD would require fluorescent penetrant inspection (FPI) of each cylinder at overhaul.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Four commenters request the FAA to allow pilots or operators who have completed a yet to be established educational workshop to conduct the visual inspections because of the frequency of these inspections, potential economic hardship, and the availability of FAA-certified mechanics who could be far away. The FAA does not concur. The FAA disagrees that the pilot inspections could substitute for the required visual inspections described in this AD. The FAA encourages the proper educational workshops to familiarize operators with the visual inspection techniques; however, the FAA still believes that the referenced inspections should be conducted by the FAA-certified mechanics who are the only certified people with the required expertise and experience to assure a comprehensive inspection.

One commenter (the manufacturer) states that the cylinder part number should be removed from the AD, and the AD should just make reference to cylinder heads because of the following three reasons: (1) The part progression history has become very complicated in the last few decades, (2) the complete part list is not available, and (3) all cylinder heads installed on the R-1340 series engines as specified in the

Applicability provision are subject to the requirements of this AD. The FAA concurs, and the part number reference has been removed from this final rule.

One commenter states that in the Applicability the "Schweizer G164A" and "De Havilland DHC3 series" should be changed to "Ag Cat Corporation G-164A" and "de Havilland DHC-3", respectively, and that the definition of "R-1340 series" should be clarified to include specific engine models in the Applicability section. The FAA concurs and the Applicability has been revised accordingly in this final rule.

One commenter states that the inspection costs listed in the economic analysis are unrealistically low because the AD will apply to ex-military "warbird" aircraft that operate these engines. The FAA does not concur. The FAA's estimated cost is based on an average of the estimates for costs for all aircraft operated under normal conditions, and based on the best available information. The costs for a particular operator may be higher than the average.

One commenter is concerned with mandating an arbitrary number of hours for inspection of PW R-1340 engines by an FAA-certificated mechanic. The FAA does not concur. The inspection intervals required by this AD are not arbitrary, but based on the frequency of cylinder head cracking observed in service, data supplied by the manufacturer, and the inspection intervals already recommended by the manufacturer in the SB.

One commenter states that the proposed inspection should include all known areas in the cylinder head where cracks could lead to a cylinder failure. The FAA does not concur. The FAA believes that the proposed inspections in this AD are a timely initiative to monitor the cylinder head cracking issue. The inspections of other areas will not be required at this point in time. However, future rulemaking may be considered when more safety data are available to warrant such inspections.

One commenter states that although the required FPI is a good proposal, it will impose significant problems for some foreign operators whose civil airworthiness authorities require special certification for performing an FPI. The FAA concurs that the FPI is essential to the proposed inspection program, but has no comment on what impact the required actions may have on a foreign operator governed by its own civil airworthiness authority.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the

adoption of the rule with the changes described previously. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

There are approximately 3,000 engines of the affected design in the worldwide fleet. The FAA estimates that 2,535 engines installed on aircraft of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per engine to accomplish the visual inspection, and 15 work hours to accomplish the FPI, and that the average labor rate is \$60 per work hour. Required parts will cost approximately \$2,000 per engine. In addition, the FAA estimates that 5% of the fleet will require replacement parts upon inspection. Based on these figures, the total cost impact of this AD on U.S. operators is estimated to be \$2,687,100.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air Transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

99-11-02 Pratt & Whitney: Amendment 39-11173. Docket 97-ANE-58-AD.

Applicability: Pratt & Whitney (PW) R-1340 series reciprocating engines including Wasp S1H1, S1H1-G, S1H2, S1H4, S1H5-G, S3H2, R-1340-61 under Type Certificate E-129, Wasp S3H1-G, R-1340-59 under Type Certificate E-142, and also Wasp S3H1 under Type Certificate E-143. These engines are installed on but not limited to the following aircraft: de Havilland DHC-3, Air Tractor AT-301, and Ag Cat Corporation G-164A.

Note 1: This airworthiness directive (AD) applies to each engine identified in the preceding Applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For engines that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent cylinder head cracking, which can result in engine power loss, forced landing, and damage to the aircraft, accomplish the following:

(a) Perform initial and repetitive visual inspection of cylinders for head cracking, and replace cracked cylinders with serviceable parts, in accordance with PW Service Bulletin (SB) No. 1787, dated September 7, 1983, as follows:

(1) For cowed and baffled installations, as follows:

(i) Perform the initial visual inspection within 125 hours time-in-service (TIS) after the effective date of this AD.

(ii) Thereafter, visually inspect at intervals not to exceed 250 hours TIS since last inspection.

(2) For all other installations, as follows:

(i) Perform the initial visual inspection within 50 hours TIS after the effective date of this AD.

(ii) Thereafter, visually inspect at intervals not to exceed 100 hours TIS since last inspection.

(b) At the last cylinder overhaul after the effective date of this AD, and at each subsequent overhaul, perform a fluorescent penetrant inspection (FPI) of cylinders for head cracking, and replace cracked cylinders with serviceable parts, in accordance with PW SB No. 1787, dated September 7, 1983.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office. Operators shall submit their request through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Engine Certification Office.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Engine Certification Office.

(d) The actions required by this AD shall be done in accordance with the following PW SB:

Document No.	Pages	Date
1787	1-4	September 7, 1983.
Total Pages: 4.		

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Pratt & Whitney, Publications Department, Supervisor Technical Publications Distribution, M/S 132-30, 400 Main Street, East Hartford, CT 06108; telephone (860) 565-7700, fax (860) 565-4503. Copies may be inspected at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street NW, suite 700, Washington, DC.

(e) This amendment becomes effective on July 19, 1999.

Issued in Burlington, Massachusetts, on May 10, 1999.

David A. Downey,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 99-12297 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. 99-NM-104-AD; Amendment 39-11172; AD 99-11-01]

RIN 2120-AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB-145 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to all EMBRAER Model

EMB-145 series airplanes. This action requires repetitive replacement of the bleed-air check valve and associated gaskets on the bleed low-pressure line of the engine, with new parts. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified in this AD are intended to prevent failure of the bleed-air check valve on the bleed low-pressure line of the engine. Such failure could result in engine compressor stall and consequent flameout of the affected engine.

DATES: Effective June 2, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 2, 1999.

Comments for inclusion in the Rules Docket must be received on or before June 17, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 99-NM-104-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert Capezzuto, Aerospace Engineer, Systems and Flight Test Branch, ACE-116A, FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30349; telephone (770) 703-6071; fax (770) 703-6097.

SUPPLEMENTARY INFORMATION: The Departamento de Aviacao Civil (DAC), which is the airworthiness authority for Brazil, notified the FAA that an unsafe condition may exist on all EMBRAER Model EMB-145 series airplanes. The DAC advises that premature wear of the bleed-air check valve on the low-pressure bleed line of the engine has been detected on several airplanes that have accumulated more than 2,000 total flight hours. Wear of the bleed-air check valve, if not corrected, could lead to

failure of the valve. Such failure could result in engine compressor stall and consequent flameout of the affected engine.

Explanation of Relevant Service Information

EMBRAER has issued Alert Service Bulletin 145-36-A011, dated March 19, 1999, which describes procedures for repetitive replacement of the bleed-air check valve and associated gaskets on the bleed low-pressure line of the left- and right-hand engine, with new parts. The DAC classified this alert service bulletin as mandatory and issued Brazilian airworthiness directive 1999-04-01, dated April 12, 1999, in order to assure the continued airworthiness of these airplanes in Brazil.

FAA's Conclusions

This airplane model is manufactured in Brazil and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD is being issued to prevent failure of the bleed-air check valve on the bleed low-pressure line of the engine. Such failure could result in engine compressor stall and consequent flameout of the affected engine. This AD requires accomplishment of the actions specified in the alert service bulletin described previously.

Interim Action

This is considered to be interim action until final action is identified, at which time the FAA may consider further rulemaking.

Determination of Rule's Effective Date

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 99-NM-104-AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an

emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

99-11-01 Empresa Brasileira de Aeronautica S.A. (EMBRAER):
Amendment 39-11172. Docket 99-NM-104-AD.

Applicability: All Model EMB-145 series airplanes, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the bleed-air check valve on the bleed low-pressure line of the engine, which could result in engine compressor stall and consequent flameout of the affected engine, accomplish the following:

(a) Prior to the accumulation of 2,000 total flight hours, or within 100 flight hours after the effective date of this AD, whichever occurs later: Replace the bleed-air check

valve, having part number (P/N) 816603-1, and associated gaskets, having P/N 24096-250C, on the bleed low-pressure line of the left- and right-hand engines, with new parts having the same P/N's; in accordance with EMBRAER Alert Service Bulletin 145-36-A011, dated March 19, 1999. Thereafter, repeat the replacement at intervals not to exceed 2,000 flight hours in accordance with the alert service bulletin.

Alternative Methods of Compliance

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Atlanta Aircraft Certification Office (ACO), FAA, Small Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Atlanta ACO.

Special Flight Permits

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(d) The replacements shall be done in accordance with EMBRAER Alert Service Bulletin 145-36-A011, dated March 19, 1999. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Small Airplane Directorate, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in Brazilian airworthiness directive 1999-04-01, dated April 12, 1999.

(e) This amendment becomes effective on June 2, 1999.

Issued in Renton, Washington, on May 10, 1999.

D. L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99-12296 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99-CE-18-AD; Amendment 39-11171; AD 99-10-07]

RIN 2120-AA64

Airworthiness Directives; Raytheon Aircraft Corporation Beech Models 65-90, 65-A90, 65-A90-1, 65-A90-2, 65-A90-3, 65-A90-4, B90, C90, C90A, E90, H90, and F90 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the **Federal Register** an amendment adopting Airworthiness Directive (AD) 99-10-07, which was sent previously to all known U.S. owners and operators of Raytheon Aircraft Corporation (Raytheon) Beech Models 65-90, 65-A90, 65-A90-1, 65-A90-2, 65-A90-3, 65-A90-4, B90, C90, C90A, E90, H90, and F90 airplanes. This AD requires inspecting for interference or damage between the elevator control cable and equipment under the cockpit floor panels (wire harnesses, stainless steel clamps, etc.) and running a cloth wrap around the control cable to detect broken strands of the control cable. This AD also requires replacing or repairing any damaged items, securing any component that is interfering with the elevator control cable, and installing additional supports and clamps as necessary to prevent sagging or further interference. This AD resulted from reports of reduced or loss of elevator control on five of the affected airplanes. The actions specified by this AD are intended to detect and correct interference between the elevator control cable and equipment under the cockpit floor panels before the elevator control cable breaks, which could result in loss of elevator control with potential loss of control of the airplane.

DATES: Effective June 8, 1999, to all persons except those to whom it was made immediately effective by priority letter AD 99-10-07, issued May 3, 1999, which contained the requirements of this amendment.

Comments for inclusion in the Rules Docket must be received on or before July 6, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket 99-CE-18-AD,

Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Information related to this AD may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Mr. Todd Dixon, Aerospace Engineer, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209, telephone: (316) 946-4152; facsimile: (316) 946-4407.

SUPPLEMENTARY INFORMATION:

Discussion

On May 3, 1999, the FAA issued priority letter AD 99-10-07, which applies to all Beech Models 65-90, 65-A90, 65-A90-1, 65-A90-2, 65-A90-3, 65-A90-4, B90, C90, C90A, E90, H90, and F90 airplanes. That AD resulted from reports of reduced or loss of elevator control on Raytheon Beech 90 series airplanes. The following briefly describes these incidents:

- During flight on a Raytheon Beech Model E90 airplane, the pilot realized he could only utilize elevator up control, declared an emergency, and safely landed using engine power and trim. Investigation revealed that the down elevator cable was severed due to chafing between this cable and the windshield de-ice circuit electrical wire. Verbal communication with an FAA Flight Standards employee indicated another incident of loss of elevator control due to interference with electrical wiring on a Raytheon Beech 90 series airplane; and
- The elevator down cable separated on a Raytheon Beech Model E90 airplane because of interference between this cable and the stainless steel clamp that joined two bleed air supply ducts. The FAA has received reports of two other incidents of reduced/loss of elevator control due to interference between the elevator down cable and the bleed air ducts on Raytheon Beech 90 series airplanes.

Priority letter AD 99-10-07 requires the following on the above-referenced airplanes:

- Removing the pilot's seat and floor panels in the cockpit area on the pilot's side of the airplane and inspecting the entire area for interference or damage between the elevator control cable and equipment under the cockpit floor panels (wire harnesses, stainless steel clamps, etc.);
- Running a cloth wrap around the control cable to detect broken strands of the control cable (Ref: 90 Series Maintenance Manual, Sections 5-20-00, 5-20-01 (if applicable), and 20-04-00);

- Replacing or repairing any damaged items found during the required inspection and cloth wrap procedure. This would include chafing damage and nicks, cuts, and broken strands on the control cable (Ref: 90 Series Maintenance Manual, Section 20-04-00, for criteria to determine if the cable needs to be replaced);
- Securing any component that is interfering with the elevator control cable and installing additional supports and clamps as necessary to prevent sagging or further interference between the elevator control cable and equipment under the cockpit floor panels. Use best shop practices and Advisory Circular (AC) 43.13-1B as guides for installing the additional supports;
- reinspecting the elevator control cable upon completion of any rework or replacement to assure that there is no interference; and
- reinstalling the floor panels and the pilot's seat.

The FAA's Determination and Explanation of the AD

Since an unsafe condition was identified that is likely to exist or develop in other Raytheon Beech Models 65-90, 65-A90, 65-A90-1, 65-A90-2, 65-A90-3, 65-A90-4, B90, C90, C90A, E90, H90, and F90 airplanes of the same type design airplanes, the FAA:

1. Determined that the elevator control cable on the Raytheon Beech 90 series airplanes could interfere with wire harnesses, stainless steel clamps, and other equipment under the cockpit floor panels;
2. Determined that immediate AD action should be taken to detect and correct such interference before the elevator control cable breaks, which could result in loss of elevator control with potential loss of control of the airplane; and
3. Issued AD 99-10-07 as a priority letter on May 3, 1999.

Compliance Time of This AD

The compliance time of this AD is structured such that the required actions would occur at the same time as the first Phase III inspection (at 600 hours time-in-service (TIS)) for low-time airplanes with less than 600 hours TIS or within the next 10 hours TIS for those airplanes with over 590 hours total TIS. The Phase III inspection is the first time the pilot's seat and the floor panels are removed during regular maintenance.

Recent inspections of low-time airplanes and airplanes just off the assembly line have not revealed any of the interference problems referenced in

this document. By structuring the compliance time to coincide with the Phase III inspection, operators of low-time airplanes do not have to accomplish an unnecessary or unjustified inspection.

Determination of the Effective Date of the AD

Since it was found that immediate corrective action was required, notice and opportunity for prior public comment thereon were impracticable and contrary to the public interest, and good cause existed to make the AD effective immediately by individual letters issued on May 3, 1999, to all known U.S. operators of Beech Models 65-90, 65-A90, 65-A90-1, 65-A90-2, 65-A90-3, 65-A90-4, B90, C90, C90A, E90, H90, and F90 airplanes. These conditions still exist, and the AD is hereby published in the **Federal Register** as an amendment to § 39.13 of the Federal Aviation Regulations (14 CFR 39.13) to make it effective as to all persons.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting immediate flight safety and, thus, was not preceded by notice and opportunity to comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following

statement is made: "Comments to Docket No. 99-CE-18-AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive (AD) to read as follows:

99-10-07 Raytheon Aircraft Corporation:
Amendment 39-11171; Docket No. 99-CE-18-AD.

Applicability: Beech Models 65-90, 65-A90, 65-A90-1, 65-A90-2, 65-A90-3, 65-A90-4, B90, C90, C90A, E90, H90, and F90 airplanes, all serial numbers, certificated in any category:

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated in the body of this AD, unless already accomplished.

To detect and correct interference between the elevator control cable and equipment under the cockpit floor panels before the elevator control cable breaks, which could result in loss of elevator control with potential loss of control of the airplane, accomplish the following:

(a) Upon accumulating 600 hours total time in service (TIS) on the airplane or within the next 10 hours TIS after the effective date of this AD, whichever occurs later, accomplish the following:

(1) Remove the pilot's seat and floor panels in the cockpit area on the pilot's side of the airplane and inspect the entire area for interference or damage between the elevator control cable and equipment under the cockpit floor panels (wire harnesses, stainless steel clamps, etc.); and

(2) Run a cloth wrap around the control cable to detect broken strands of the control cable (Ref: 90 Series Maintenance Manual, Sections 5-20-00, 5-20-01 (if applicable), and 20-04-00).

(b) Prior to further flight after the actions required by paragraph (a), including all subparagraphs, of this AD, accomplish the following:

(1) Replace or repair any damaged items found during the inspection and cloth wrap procedure required in paragraphs (a)(1) and (a)(2) of this AD, respectively. This would include chafing damage and nicks, cuts, and broken strands on the control cable (Ref: 90 Series Maintenance Manual, Section 20-04-00, for criteria to determine if the cable needs to be replaced);

(2) Secure any component that is interfering with the elevator control cable and install additional supports and clamps as necessary to prevent sagging or further interference between the elevator control cables and equipment under the cockpit floor panels. Use best shop practices and Advisory Circular (AC) 43.13-1B as guides for installing the additional supports;

(3) Reinspect the elevator control cables in accordance with the procedures specified in paragraph (a)(1) of this AD upon completion of any rework or replacement to assure that there is no interference; and

(4) Re-install the floor panels and pilot's seat.

Note 2: Raytheon Safety Communique No. 143, dated October 1997, is not considered an alternative method of compliance to this AD.

(c) An alternative method of compliance or adjustment of the compliance times that provides an equivalent level of safety may be approved by the Manager, Wichita Aircraft Certification Office (ACO), 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Wichita ACO.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Wichita ACO.

(d) Information related to this priority letter AD may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(e) This amendment becomes effective on June 8, 1999, to all persons except those persons to whom it was made immediately effective by priority letter AD 99-10-07, issued May 3, 1999, which contains the requirements of this amendment.

Issued in Kansas City, Missouri, on May 7, 1999.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99-12295 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99-SW-03-AD; Amendment 39-11174; AD 99-11-03]

RIN 2120-AA64

Airworthiness Directives; Eurocopter France Model SA341G and SA342J

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to Eurocopter France Model SA341G and SA342J helicopters. This action requires, before further flight, visually inspecting the external body of each main rotor head pitch-change rod (rod) for corrosion. If external corrosion is found, this action also requires a visual inspection of the inside of the body of that rod for corrosion. A rod with external corrosion that exceeds the repair criteria or a rod with any internal corrosion must be replaced with an airworthy rod. This amendment is prompted by the report of a deep internal corrosion fault in a rod found by a military helicopter operator performing a daily inspection. This

condition, if not corrected, could result in failure of a rod and subsequent loss of control of the helicopter.

DATES: Effective June 2, 1999.

Comments for inclusion in the Rules Docket must be received on or before July 19, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 99-SW-03-AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Mike Mathias, Aerospace Engineer, FAA, Rotorcraft Directorate, Rotorcraft Standards Staff, Fort Worth, Texas 76193-0111, telephone (817) 222-5123, fax (817) 222-5961.

SUPPLEMENTARY INFORMATION: The Direction Generale De L'Aviation Civile (DGAC), the airworthiness authority for France, recently notified the FAA that an unsafe condition may exist on Eurocopter France Model SA341G and SA342J helicopters. The DGAC advises of the discovery of corrosion affecting a rod, which could lead to the failure of the rod and subsequent loss of control of the helicopter.

Eurocopter France issued Telex No. 00079, dated December 23, 1998, which specifies inspecting the body of each rod for stains, paint discoloration, and blistering, particularly on the lower straight section of the rod body. If any of these conditions are found, the telex specifies removal of the rod and an internal check of the body and its lower end fitting. The DGAC issued AD T98-551-039(A), dated December 31, 1998, to ensure the continued airworthiness of these helicopters in France.

These helicopter models are manufactured in France and are type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other Eurocopter France Model SA341G and SA342J helicopters of the same type design registered in the United States, this AD is being issued to prevent the failure of a rod and subsequent loss of control of the

helicopter. This AD requires, prior to further flight, visually inspecting the body of each rod for external corrosion. If external corrosion is found, this AD requires visually inspecting the inside of the body of each rod for corrosion. This action also requires inspecting each rod for internal corrosion prior to 10 hours time-in-service (TIS) or 7 calendar days, whichever occurs first, unless previously accomplished. The short compliance time involved is required because the previously described critical unsafe condition can adversely affect the controllability of the helicopter. Therefore, this AD requires, before further flight, inspecting each rod and replacing any unairworthy rod with an airworthy rod, and this AD must be issued immediately.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable and that good cause exists for making this amendment effective in less than 30 days.

The FAA estimates that 24 helicopters will be affected by this AD, that it will take approximately 1 work hour to accomplish the external visual inspection and 2 work hours to accomplish the internal visual inspection, and that the average labor rate is \$60 per work hour. Required parts will cost approximately \$300 per helicopter. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$11,520 to inspect all helicopters and replace one rod on each helicopter.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic,

environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 99-SW-03-AD." The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

AD 99-11-03 Eurocopter France:

Amendment 39-11174. Docket No. 99-SW-03-AD.

Applicability: Models SA341G and SA342J, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the main rotor head pitch change rod (rod), accomplish the following:

(a) Before further flight, inspect the external body of the rod, part number 341A31.4163.00, for corrosion.

(1) If external corrosion is found, inspect the inside of the body of each rod for corrosion.

(2) Replace each rod having external corrosion exceeding the repair criteria of the repair manual or each rod having internal corrosion with an airworthy rod.

Note 2: A rod having only external corrosion within the repair criteria of the repair manual is airworthy when repaired. Any internal corrosion is unairworthy.

(b) Unless previously accomplished under paragraph (a), inspect the inside of the body of each rod for corrosion within 10 hours time-in-service or 7 calendar days, whichever occurs first. If corrosion is found, replace the rod with an airworthy rod.

Note 3: Eurocopter France Telex No. 00079, dated December 23, 1998, pertains to the subject of this AD.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Rotorcraft Standards Staff. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Rotorcraft Standards Staff.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Rotorcraft Standards Staff.

(d) This amendment becomes effective on June 2, 1999.

Note 5: The subject of this AD is addressed in Direction Generale De L'Aviation Civile,

France, AD No. T98-551-039(A), dated December 31, 1998.

Issued in Fort Worth, Texas, on May 10, 1999.

Eric Bries,

*Acting Manager, Rotorcraft Directorate,
Aircraft Certification Service.*

[FR Doc. 99-12416 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-U

**DEPARTMENT OF HEALTH AND
HUMAN SERVICES**

Food and Drug Administration

21 CFR Part 173

[Docket No. 98F-0342]

**Secondary Direct Food Additives
Permitted in Food for Human
Consumption**

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of acidified solutions of sodium chlorite as an antimicrobial agent in poultry processing. This action is in response to a petition filed by Alcide Corp.

DATES: This regulation is effective May 18, 1999. Submit written objections and requests for a hearing by June 17, 1999.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Robert L. Martin, Center for Food Safety and Applied Nutrition (HFS-215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204-0001, 202-418-3074.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of June 4, 1998 (63 FR 30498), FDA announced that a food additive petition (FMY 8A4591) had been filed by Alcide Corp., 8561 154th Ave. NE., Redmond, WA 98052. The petition proposed to amend the food additive regulation in § 173.325 (21 CFR 173.325) to provide for a lower pH in the use of acidified sodium chlorite solutions as an antimicrobial agent in poultry processing.

FDA has evaluated data in the petition and other relevant material. The agency concludes that: (1) The proposed use of the additive is safe, (2) the additive will achieve its intended technical effect, and, therefore, (3) the

regulation in § 173.325 should be amended as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

This final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

Any person who will be adversely affected by this regulation may at any time on or before June 17, 1999, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 173

Food additives.
Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 173 is amended as follows:

**PART 173—SECONDARY DIRECT
FOOD ADDITIVES PERMITTED IN
FOOD FOR HUMAN CONSUMPTION**

1. The authority citation for 21 CFR part 173 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348.

2. Section 173.325 is amended by revising paragraph (b)(1) to read as follows:

§ 173.325 Acidified sodium chlorite solutions.

* * * * *

(b) * * *

(1) When used in a carcass spray or dip solution, the additive is used at levels that result in sodium chlorite concentrations between 500 and 1,200 parts per million (ppm), in combination with any GRAS acid at levels sufficient to achieve a solution pH of 2.3 to 2.9.

* * * * *

Dated: May 10, 1999.

William K. Hubbard,

*Associate Commissioner for Policy
Coordination.*

[FR Doc. 99-12391 Filed 5-17-99; 8:45 am]

BILLING CODE 4160-01-F

**DEPARTMENT OF HEALTH AND
HUMAN SERVICES**

Food and Drug Administration

21 CFR Part 178

[Docket No. 98F-0824]

**Indirect Food Additives: Adjuvants,
Production Aids, and Sanitizers**

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of anthra(2,1,9-def:6,5,10-d'e'f)diisoquinoline-1,3,8,10 (2H,9H)-tetrone (C.I. Pigment Violet 29) as a colorant for polymers intended for use in contact with food. This action is in response to a petition filed by BASF Corp.

DATES: Effective May 18, 1999; written objections and requests for a hearing by June 17, 1999.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA-

305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Vir D. Anand, Center for Food Safety and Applied Nutrition (HFS-215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-418-3081.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of October 6, 1998 (63 FR 53679), FDA announced that a food additive petition (FAP 8B4626) had been filed by BASF Corp., 3000 Continental Dr. North, Mt. Olive, NJ 07828-1234. The petition proposed to amend the food additive regulations in § 178.3297 *Colorants for polymers* (21 CFR 178.3297) to provide for the safe use of anthra(2,1,9-def:6,5,10-d'e'f)diisoquinoline-1,3,8,10(2H,9H)-tetrone (C.I. Pigment Violet 29) as a colorant for polymers intended for use in contact with food.

FDA has evaluated data in the petition and other relevant material. Based on this information, the agency concludes that the proposed use of the additive as a colorant for all polymers intended for use in contact with food is safe and that the additive will have the intended technical effect. Therefore, the regulations in § 178.3297 should be amended as set forth below.

In accordance with § 171.1(h) (21CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in § 171.1(h),

the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has previously considered the potential environmental effects of this rule as announced in the notice of filing for the petition. No new information or comments have been received that would affect the agency's previous determination that there is no significant impact on the human environment and that an environmental impact statement is not required.

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

Any person who will be adversely affected by this regulation may at any time on or before June 17, 1999 file with the Dockets Management Branch (address above) a written objection thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include

such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objection received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 178

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 178 is amended as follows:

PART 178—INDIRECT FOOD ADDITIVES: ADJUVANTS, PRODUCTION AIDS, AND SANITIZERS

1. The authority citation for 21 CFR part 178 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348, 379e.

2. Section 178.3297 is amended in the table in paragraph (e), by alphabetically adding an entry for anthra(2,1,9-def:6,5,10-d'e'f)diisoquinoline-1,3,8,10(2H,9H)-tetrone (C.I. Pigment Violet 29) under the headings "Substances" and "Limitations" to read as follows:

§ 178.3297 Colorants for polymers.

* * * * *

(e) * * *

Substances	Limitations
* * *	* * *
Anthra(2,1,9-def:6,5,10-d'e'f)diisoquinoline-1,3,8,10(2H,9H)-tetrone (C.I. Pigment Violet 29; CAS Reg. No. 81-33-4)	For use at levels not to exceed 1% by weight of polymers. The finished articles are to contact food only under conditions of use B through H as described in Table 2 of § 176.170(c) of this chapter.
* * *	* * *

Dated: May 5, 1999.

L. Robert Lake,

Director, Office of Policy, Planning and Strategic Initiatives, Center for Food Safety and Applied Nutrition.

[FR Doc. 99-12396 Filed 5-17-99 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 178

[Docket No. 92F-0285]

Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the expanded safe use of bis(p-ethylbenzylidene) sorbitol as a clarifying agent for polypropylene articles intended for use in contact with food. This action responds to a petition filed by Mitsui Toatsu Chemicals, Inc. (now Mitsui Chemicals, Inc.).

DATES: Effective May 18, 1999; written objections and requests for a hearing by June 17, 1999

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Hortense S. Macon, Center for Food Safety and Applied Nutrition (HFS-216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-418-3086.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of August 10, 1992 (57 FR 35595), FDA announced that a food additive petition (FMY 2B4330) had been filed by Mitsui Toatsu Chemicals, Inc., c/o 1001 G St. NW., suite 500 West, Washington, DC 20001. The petition proposed to amend the food additive regulations in § 178.3295 *Clarifying agents for polymers* (21 CFR 178.3295) to provide for the expanded safe use of bis(*p*-ethylbenzylidene) sorbitol as a clarifying agent for polypropylene articles intended for use in contact with food. Subsequent to the filing of the petition, Mitsui Toatsu Chemicals, Inc., merged with Mitsui Chemicals, Inc. Therefore, the current name of the petitioner is Mitsui Chemicals, Inc.

FDA has evaluated data in the petition and other relevant material. Based on this information, the agency concludes that the proposed use of the additive is safe, that the additive will achieve its intended technical effect, and that therefore the regulations in § 178.3295 should be amended as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the

documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

Any person who will be adversely affected by this regulation may at any time on or before June 17, 1999, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a

waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 178

Food additives, Food packaging. Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 178 is amended as follows:

PART 178—INDIRECT FOOD ADDITIVES: ADJUVANTS, PRODUCTION AIDS, AND SANITIZERS

1. The authority citation for 21 CFR part 178 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348, 379e.

2. Section 178.3295 is amended in the table by revising the entry for "Bis(*p*-ethylbenzylidene) sorbitol" to read as follows:

§ 178.3295 Clarifying agents for polymers.
* * * * *

Substances	Limitations
Bis(<i>p</i> -ethylbenzylidene) sorbitol (CAS Reg. No. 79072-96-1). * * * * *	For use only as a clarifying agent at a level not to exceed 0.35 percent by weight of olefin polymers complying with § 177.1520(c) of this chapter, items 1.1a, 1.1b, 3.1a, 3.2a, or 3.2b, where the copolymers complying with items 3.1a, 3.2a, or 3.2b contain not less than 85 weight percent of polymer units derived from propylene. * * * * *

Dated: May 3, 1999.

L. Robert Lake,

Director, Office of Policy, Planning and Strategic Initiatives, Center for Food Safety and Applied Nutrition.

[FR Doc. 99-12394 Filed 5-17-99; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Fenbendazole

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Hoechst Roussel Vet. The supplemental NADA provides for revised feeding instructions for using fenbendazole in Type C medicated swine feeds to allow for restricted feeding of sows.

EFFECTIVE DATE: May 18, 1999.

FOR FURTHER INFORMATION CONTACT:

Janis R. Messenheimer, Center for Veterinary Medicine (HFV-135), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-827-7578.

SUPPLEMENTARY INFORMATION: Hoechst Roussel Vet, 30 Independence Blvd., P.O. Box 4915, Warren, NJ 07059, filed supplemental NADA 131-675 for fenbendazole Type C medicated swine feeds. The supplemental NADA provides for increasing the concentration of fenbendazole in Type C medicated swine feeds from 10 to 80 grams per ton (g/t) to 10 to 300 g/t to be fed at 9 milligrams per kilogram (mg/kg) (4.08 mg per pound (lb)) over a 3- to 12-day period. The supplement is approved as of April 16, 1999, and the regulations in 21 CFR 558.258(c)(1)(i) are amended to reflect that fenbendazole Type C medicated swine feeds contain 10 to 300 g/t fenbendazole and are fed at 9 mg/kg body weight (4.08 mg/lb) over a 3- to 12-day period.

The supplemental NADA approval provides for clarification of the amount of drug fed to the animals for treatment. No additional safety or effectiveness data were required. Therefore, a freedom of information summary is not required.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

§ 558.258 [Amended]

2. Section 558.258 *Fenbendazole* is amended in paragraph (c)(1)(i) introductory text by removing "10 to 80" and adding in its place "10 to 300".

Dated: May 4, 1999.

Margaret Ann Miller,

Acting Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 99-12395 Filed 5-17-99; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Lasalocid and Bacitracin Zinc

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Roche Vitamins, Inc. The NADA provides for the use of approved lasalocid Type A medicated articles and bacitracin zinc Type A medicated articles in making Type C medicated feed used for the prevention of coccidiosis caused by *Eimeria meleagridis*, *E. gallopavonis*, and *E. adenoides*, and for increased rate of weight gain and improved feed efficiency in growing turkeys.

EFFECTIVE DATE: May 18, 1999.

FOR FURTHER INFORMATION CONTACT:

Charles J. Andres, Center for Veterinary Medicine (HFV-128), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-827-1600.

SUPPLEMENTARY INFORMATION: Roche Vitamins, Inc., 45 Waterview Blvd., Parsippany, NJ 07054-1298, is the sponsor of NADA 141-109 that provides for the use of 20 percent of lasalocid Type A medicated articles and bacitracin zinc Type A medicated

articles containing 50 grams (g) per pound bacitracin activity in making Type C medicated feed containing 68 to 113 g/ton (t) lasalocid and 4 to 50 g/t bacitracin zinc used for the prevention of coccidiosis caused by *Eimeria meleagridis*, *E. gallopavonis*, and *E. adenoides* and for increased rate of weight gain and improved feed efficiency in growing turkeys. The NADA is approved as of April 15, 1999, and the regulations are amended in 21 CFR 558.78 and 558.311 to reflect the approval. The basis for approval is discussed in the freedom of information summary.

In accordance with the freedom of information provisions of 21 CFR part 20 and 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

The agency has determined under 21 CFR 25.33(a)(2) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

2. Section 558.78 is amended by revising paragraph (d)(3)(xii) to read as follows:

§ 558.78 Bacitracin zinc.

* * * * *

(d) * * *

(3) * * *

(xii) Lasalocid sodium alone or with roxarsone as in § 558.311.

* * * * *

3. Section 558.311 is amended in the table by revising paragraph (e)(1)(xiv) to read as follows:

§ 558.311 Lasalocid.

* * * * *

(e)(1) * * *

Lasalocid sodium activity in grams per ton	Combination in grams per ton	Indications for use	Limitations	Sponsor
* * *	* * *	* * *	* * *	* * *
(xiv) 68 (0.0075 pct) to 113 (0.0125 pct)	Bacitracin 4 to 50	Growing turkeys; for prevention of coccidiosis caused by <i>E. meleagritidis</i> , <i>E. gallopavonis</i> , and <i>E. adenoeides</i> .	Feed continuously as sole ration	000004
		Growing turkeys; for prevention of coccidiosis caused by <i>E. meleagritidis</i> , <i>E. gallopavonis</i> , and <i>E. adenoeides</i> ; for increased rate of weight gain and improved feed efficiency.	Feed continuously as sole ration	063238
* * *	* * *	* * *	* * *	* * *

* * * * *

Dated: April 30, 1999.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 99-12393 Filed 5-17-99; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 1**

[TD 8820]

RIN 1545-AU11

Section 467 Rental Agreements; Treatment of Rent and Interest Under Certain Agreements for the Lease of Tangible Property**AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Final regulations.

SUMMARY: This document contains final regulations relating to the treatment of rent and interest under certain agreements for the lease of tangible property. The regulations apply to certain rental agreements that provide increasing or decreasing rents, or deferred or prepaid rent, and provide guidance for lessees and lessors of tangible property.

DATES: Effective Date: These regulations are effective on May 18, 1999.

Applicability Date: For dates of applicability of these regulations, see Effective Dates under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Forest Boone of the Office of Assistant Chief Counsel (Income Tax and

Accounting) at (202) 622-4960 (not a toll-free number).

SUPPLEMENTARY INFORMATION:**Background**

Section 467 was added to the Internal Revenue Code by section 92(a) of the Tax Reform Act of 1984 (Pub. L. 98-369 (98 Stat. 609)). On June 3, 1996, the IRS and Treasury Department issued a notice of proposed rulemaking (61 FR 27834 [IA-292-84, 1996-2 C.B. 462]) relating to section 467. The proposed regulations provide guidance regarding the applicability of section 467, and the amount of rent and interest required to be accrued under section 467.

Comments responding to the notice were received, and a public hearing was held on September 25, 1996.

The IRS and Treasury Department issued interim guidance in Notice 97-72 (1997-2 C.B. 334), which informed taxpayers of certain conditions under which a refinancing of indebtedness incurred by a lessor to acquire property that is the subject of a rental agreement will not be considered a substantial modification of that agreement for purposes of section 467. After considering the comments that were received in response to the notice of proposed rulemaking and the statements made at the public hearing, the proposed regulations are adopted as revised by this Treasury decision. The significant comments and revisions are discussed below.

Explanation of Provisions**1. Section 467 Rental Agreements**

Under the proposed and final regulations, section 467 applies to any rental agreement with increasing or decreasing rent and aggregate rental

payments or other consideration of more than \$250,000. A rental agreement has increasing or decreasing rents if the annualized fixed rent allocated to any rental period exceeds the annualized fixed rent allocated to any other rental period in the lease term.

In determining whether a rental agreement has increasing or decreasing rent, the proposed regulations provide that a rent holiday at the beginning of the lease term is disregarded if the rent holiday period is three months or less. Several commentators requested that the rent holiday period be lengthened, arguing that it should be the same as the rent holiday period permitted for determining whether a leaseback or long-term agreement has tax-motivated increasing rents (the lesser of 24 months or 10 percent of the lease term). The final regulations do not adopt this suggestion.

Section 467(d)(1)(B) provides that a rental agreement will be treated as a section 467 rental agreement if there are increases in the amount to be paid as rent under the agreement. Except for the \$250,000 de minimis exception set forth in section 467(d)(2), section 467 does not contain any exceptions to the rule that rental agreements with increasing rent are section 467 rental agreements. The three-month rent holiday exception was added in the proposed regulations to prevent relatively insubstantial rent holidays from causing a rental agreement to be treated as a section 467 rental agreement. Accordingly, the three-month rent holiday exception is intended merely as a de minimis exception and a rule of administrative convenience. In contrast, Congress specifically directed that a rent holiday safe harbor should be provided for

normal commercial practices in determining whether a leaseback or long-term agreement has tax-motivated increasing rents. Thus, since the policies that support a rent holiday exception for disqualified leasebacks and long-term agreements are clearly not the same as the policies that support a rent holiday exception for whether an agreement has increasing rent and is therefore a section 467 rental agreement, the IRS and Treasury Department do not believe the rent holiday periods should be the same.

The proposed regulations also provide that a rental agreement has increasing or decreasing rent if it requires (or may require) the payment of contingent rent, other than contingent rent that is contingent due to (a) a provision computing rent based on a percentage of the lessee's gross or net receipts (but only if the percentage does not vary throughout the term of the lease); (b) adjustments based on a reasonable price index; or (c) a provision requiring the lessee to pay real estate taxes, insurance premiums, maintenance costs, or any other cost (other than a debt service cost) that relates to the leased property and is not within the control of the lessor or lessee or a person related to the lessor or lessee. Several commentators requested additional exceptions for other types of payments, as well as an expansion of the existing exceptions.

The final regulations provide several additional types of contingent payments that will not be taken into account in determining whether a rental agreement has increasing or decreasing rent. Because of the relationship between these contingent rent provisions and the contingent rent provisions that are disregarded in determining whether an agreement is a disqualified leaseback or long-term agreement, the new contingent rent exceptions will be discussed below in connection with the discussion of disqualified leasebacks and long-term agreements.

2. Section 467 Rent

Under the proposed and final regulations, the section 467 rent for a taxable year is the sum of the fixed rent for any rental periods that begin and end in the taxable year, a ratable portion of the fixed rent for other rental periods beginning or ending in the taxable year, and any contingent rent that accrues in the taxable year. The amount of fixed rent for a rental period depends on the terms of the rental agreement and, under the regulations, will be either the amount of fixed rent allocated to the period under the agreement, the constant rental amount, or the proportional rental amount.

A. Disqualified Leaseback or Long-term Agreement

The proposed regulations provide that (a) the Commissioner, rather than the parties to the rental agreement, will determine whether a rental agreement is a disqualified leaseback or long-term agreement and (b) a rental agreement will not be a disqualified leaseback or long-term agreement unless it requires more than \$2,000,000 in rental payments and other consideration. The proposed regulations also provide that, if either the lessor or the lessee is not subject to Federal income tax on its income or is a tax-exempt entity (within the meaning of section 168(h)(2)), the rental agreement will be closely scrutinized, and clear and convincing evidence will be required to establish that tax avoidance is not a principal purpose for providing increasing or decreasing rent. The proposed regulations include as safe harbors only the provisions set forth in section 467(b)(5) and an uneven rent test based on Rev. Proc. 75-21 (1975-1 C.B. 715). Other factors that would be considered as evidence of tax avoidance were not provided.

Several commentators requested additional safe harbors for other types of payments, as well as an expansion of the existing safe harbors. In response to these comments, several changes have been made in the final regulations to the tax avoidance and safe harbor provisions.

(i) *Determining tax avoidance.* The proposed regulations do not provide any substantive rules for determining tax avoidance because a leaseback or long-term agreement will not be treated as disqualified in the absence of an affirmative determination by the Commissioner. As a result, the objective of consistency of treatment between the lessee and lessor would have been met without the need to promulgate factors or other rules that taxpayers could use to determine whether tax avoidance was present. While the final regulations retain the rule that only the Commissioner may make a tax avoidance determination, the IRS and Treasury Department believe that the combination of substantive guidance on tax avoidance and additional safe harbors will permit taxpayers to determine more readily whether their leasebacks or long-term agreements will be determined to be disqualified by the Commissioner. Accordingly, substantive provisions have been added to the final regulations prescribing the circumstances in which Federal income tax avoidance will be treated as a

principal purpose for providing increasing or decreasing rent.

The final regulations provide that, if a significant difference between the marginal Federal income tax rates of the lessor and lessee can reasonably be expected at some time during the lease term, the agreement will be closely scrutinized and clear and convincing evidence will be required to establish that tax avoidance is not a principal purpose for providing increasing or decreasing rent. The regulations provide rules to determine when there is a significant difference in marginal tax rates of the lessor and lessee. Under these rules, the marginal tax rates are determined not only by reference to the Federal income tax status of the taxpayer (for example, as a corporation, partnership, or individual), but also to the specific circumstances of the taxpayer. Thus, if a corporation either is subject to the alternative minimum tax or has available net operating losses or credits to carry forward from an earlier taxable year, the corporation's marginal tax rate will differ from other corporations not subject to the alternative minimum tax and not having available net operating losses or credits. Further, in the case of an S corporation or partnership, the marginal tax rate will be determined by taking into account the amounts of income or deduction allocable to its shareholders or partners, respectively, and the marginal tax rates of the shareholders or partners.

Finally, as noted above, the final regulations retain the rule of the proposed regulations that only the Commissioner may determine that a section 467 rental agreement should be treated as a disqualified leaseback or long-term agreement. The final regulations also provide that such determination may be made either on a case-by-case basis or in regulations or other guidance published by the Commissioner providing that a certain type or class of leaseback or long-term agreement will be treated as disqualified and subject to constant rental accrual.

(ii) *Safe harbors.* In response to comments, the final regulations include several safe harbor provisions not included in the proposed regulations. The new safe harbors are intended to cover a variety of payments that could be made under the terms of a rental agreement. Under the final regulations, tax avoidance is not considered a principal purpose for providing increasing or decreasing rent if the increase or decrease in rent is described in one of the contingent rent safe harbor provisions. The IRS and Treasury Department believe that these additional safe harbors and the expansion of the

existing safe harbors appropriately balance the need to provide a degree of certainty for taxpayers with the need to limit the potential for tax avoidance.

The final regulations add several safe harbors for various types of contingent payments that either are intended to compensate the lessor for costs unrelated to the lessor's continuing investment in the leased property or are so contingent that they should not be taken into account for purposes of section 467 until the liability for such payment becomes fixed. Accordingly, subject to the limitations in the regulations, safe harbors are provided for payments required to be made by the lessee: in the event of damage, destruction, or loss of the leased property; in the case of a qualified motor vehicle operating agreement within the meaning of section 7701(h)(2)(A), for the failure of the property to maintain a specified residual value; for the failure of the property to be returned to the lessor at the end of the lease term in the condition specified in the agreement; or for the failure of the lessor to obtain the income tax benefits contemplated by the agreement. In addition, a provision requiring late payment charges is also not taken into account in determining whether tax avoidance is present in a leaseback or long-term agreement. Limitations on the scope of these safe harbors are provided in order to ensure that these provisions are included in the agreement for a valid business purpose and that the provisions are not used to achieve tax avoidance.

Several commentators suggested that rent adjustments based on the lessor's indebtedness, which itself bears interest at a variable rate, are not tax motivated. In response, a safe harbor has also been added for certain variable interest rate provisions. Under this safe harbor, a rent adjustment provision will be disregarded if it is based solely on the dollar amount of changes in the lessor's interest costs, and only if the lessor and the lender are not related and the indebtedness is evidenced by a variable rate debt instrument (within the meaning of § 1.1275-5(a)(1)). However, no inference may be drawn from this safe harbor (or any other provision of the regulations relating to a variable interest rate adjustment) concerning the effect of such an adjustment on the classification of the rental agreement as a lease for Federal income tax purposes.

In addition, the final regulations expand the scope of the safe harbors provided in the proposed regulations relating to percentage rents, inflation adjustments, and reasonable rent holidays. A provision in a lease will not

fail to qualify for the percentage rent safe harbor because, for example, it applies to receipts or sales after making certain limited deductions, it applies different percentages to different departments or floors, or it applies to receipts or sales in excess of a determinable amount. In addition, a provision will not fail to qualify as an increase based on a reasonable price index because it may limit the adjustment to a fixed percentage in some years. However, this inflation adjustment safe harbor will not apply if the limitation in the rental agreement represents, in substance, a series of fixed increases in rent. For example, if the limitation on an annual inflation adjustment is substantially below the level of inflation reasonably expected during the lease term, the limitation is, in substance, a series of fixed increases in rent.

The proposed regulations include a rent holiday safe harbor for the determination of tax avoidance, which provision applies only if there is a substantial business purpose for the rent holiday. Commentators objected to this requirement because the requirement of a business purpose was not set forth in the legislative history accompanying the enactment of section 467. The final regulations delete the requirement that there be a substantial business purpose for the rent holiday, but add the requirement that was set forth in the legislative history. H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 893 (1984). Under the additional rule in the final regulations, the reasonableness of the rent holiday is determined by reference to the commercial practice (as of the agreement date) in the locality where the use of the property occurs. This commercial reasonableness requirement does not apply, however, in the case of a rent holiday of three months or less at the beginning of the lease term.

The proposed regulations also limit the rent holiday safe harbor to rent holidays at the beginning of the lease term. The final regulations remove this limitation and permit one consecutive period at any point during the lease term to qualify for the rent holiday safe harbor if the commercial reasonableness requirement is satisfied and the rent holiday period does not exceed the lesser of 24 months or 10 percent of the lease term.

Finally, except in the case of the rent holiday safe harbor, the safe harbor provisions discussed above also apply in determining whether a rental agreement has increasing or decreasing rent and is thus subject to section 467. Accordingly, if a type of contingent rent in a rental agreement meets the

requirements of the applicable safe harbor provision, it is not taken into account in determining whether the agreement has increasing or decreasing rent for purposes of both the application of section 467 and the determination of whether the agreement is a disqualified leaseback or long-term agreement.

(iii) *Uneven rent test.* The proposed regulations contain a safe harbor providing that tax avoidance will not be considered to be a principal purpose for providing increasing or decreasing rents if the rents allocable to each calendar year of the lease do not vary from the average annual rents over the entire lease term by more than 10 percent. This "uneven rent test" is derived from the Conference Committee Report, which stated that the Committee anticipated that regulations under section 467 would adopt standards under which leases providing for fluctuations in rents by no more than a reasonable percentage above or below the average rent over the term of the lease will be deemed not to be motivated by tax avoidance. The report cited the standards for advance rulings on leveraged lease transactions in Rev. Proc. 75-21, and stated that such standards may not be appropriate for real estate leases. H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 893 (1984). The proposed regulations do not provide a safe harbor specifically applicable to real estate leases but comments were requested on whether a different uneven rent test should be established for real estate leases.

Commentators requested that the basic "90-110" test in Rev. Proc. 75-21 be adopted without modification. The principal modification to the basic 90-110 test in the proposed regulations identified by the commentators was the use of the calendar year rather than the lease year to test for uneven rents. These commentators also requested that the alternate uneven rent test (sometimes referred to as the "2/3-1/3" test) be adopted as an additional safe harbor. Finally, these commentators requested clarification of the application of these uneven rent tests in certain circumstances.

In response to these comments, the final regulations expand and clarify the scope of the uneven rent test in the proposed regulations. First, the final regulations allow a rent holiday period at the beginning of the lease term to be ignored in applying the uneven rent test if its duration is not more than three months. Further, all but two of the contingent rent provisions ignored for purposes of determining tax avoidance are also disregarded in applying the uneven rent test. Rules are also

provided to assist taxpayers in applying the uneven rent test if the rental agreement contains a variable rent provision.

For long-term leases of real estate, the final regulations provide a modified uneven rent test. Under the final regulations, all of the rules relating to the uneven rent test will be applied to long-term leases of real estate, except that a 15 percent variance will be permitted in lieu of the 10 percent variance (the "85-115" test) and a rent holiday will be disregarded if it is commercially reasonable and its duration does not exceed the lesser of 24 months or 10 percent of the lease term.

The final regulations do not adopt the suggestion that the alternative $\frac{2}{3}$ - $\frac{1}{3}$ test also be made available as an additional safe harbor. Section 467 evidences recognition that tax avoidance may result from the use of either increasing or decreasing rents in a section 467 rental agreement, depending on the circumstances of the lessor and lessee in the particular transaction. The IRS and Treasury Department believe that the use of the $\frac{2}{3}$ - $\frac{1}{3}$ test may, in some cases, result in substantial decreases in rent. Thus, the $\frac{2}{3}$ - $\frac{1}{3}$ test is not included in the final regulations.

Furthermore, the final regulations retain the use of the calendar year as the basis for applying the uneven rent test. The IRS and Treasury Department believe that use of the calendar year is most consistent with the structure of section 467, which provides the calendar year as the basis for determining whether rent is deferred.

Some commentators requested additional safe harbors and other special rules for leases of real estate, including the allowance of fixed increases that approximate the parties' expectations of general price increases during the lease term. The final regulations do not provide any additional provisions relating to real estate leases except for the modified 85-115 uneven rent test and the expanded rent holiday safe harbor. The IRS and Treasury Department believe that any fixed increases in a real estate lease that exceed the permitted variance under the relaxed safe harbor should be tested for tax avoidance under the general standards.

(iv) *The \$2,000,000 limitation.* The proposed regulations provide that, among other limitations, a rental agreement will not be treated as a disqualified leaseback or long-term agreement unless it requires more than \$2,000,000 in rental payments and other consideration.

Although the \$2,000,000 limitation has been retained in the final regulations, the IRS and Treasury no longer believe such a limitation is appropriate. Accordingly, the IRS and Treasury are issuing proposed regulations that would eliminate the \$2,000,000 limitation on a prospective basis.

B. Rental Agreement Accrual

Under the proposed and final regulations, if neither the constant rental amount nor the proportional rental amount is required to be accrued, the rent to be accrued for a rental period is the rent allocated to that rental period in accordance with the section 467 rental agreement. The amount of rent allocated to a rental period by the rental agreement depends on whether the agreement provides a specific allocation of fixed rent. If a rental agreement provides a specific allocation of fixed rent, the amount of rent allocated to each rental period during the lease term is the amount of fixed rent allocated to that period by the agreement. In general, a rental agreement specifically allocates fixed rent if the agreement unambiguously specifies, for periods of no longer than a year, a fixed amount of rent for which the lessee becomes liable on account of the use of the property during that period.

The proposed regulations provide that, in the absence of a specific allocation of fixed rent, the amount of rent allocated to each rental period during the lease term is the amount of fixed rent payable during that rental period. A number of commentators requested that the rule for allocating rent in the absence of a specific allocation of fixed rent be amended. The commentators stated that, if a rental agreement contains only a rent payment schedule without a separate rent allocation schedule, the agreement should be treated as one that does not provide for an allocation of rents. In these circumstances, the commentators contend that the agreement should be subject to constant rental accrual under section 467(b)(3)(B).

The final regulations do not adopt this suggestion. Instead, the final regulations, like the proposed regulations, provide that, in the absence of a specific allocation of fixed rent, the amount of fixed rent allocated to a rental period is the amount of fixed rent payable during that rental period. The IRS and Treasury Department believe that it is inappropriate to apply the constant rental accrual rules solely because a rental agreement does not include a specific allocation of fixed rent, whether as a result of

inadvertence, failure to obtain professional tax advice, or otherwise. Further, while the constant rental accrual method is not available unless the Commissioner makes a tax avoidance determination, parties wishing to accrue rent in accordance with the constant rental accrual method may provide for an allocation schedule in their rental agreement with tax consequences that approximate the use of the constant rental accrual method.

C. Other Applicable Limitations

Some commentators suggested that the final regulations provide that rental agreements will be closely scrutinized for substantial economic effect in appropriate cases. For example, a rental agreement may provide a specific allocation of fixed rent (or no specific allocation of fixed rent) that, under the regulations, would result in significant back-loaded or front-loaded rent, but would not be subject to constant rental accrual because it is not a leaseback or long-term agreement. In general, the rules of section 467 represent exceptions to the general rules of tax accounting applicable to income and expense associated with rental agreements. However, the IRS and Treasury Department do not believe that section 467 and the regulations thereunder override other principles of Federal tax law in the case of income and expense associated with rental agreements. Thus, the final regulations explicitly provide that the Commissioner may apply authorities other than section 467 and the regulations thereunder, such as section 446(b) clear-reflection-of-income principles, section 482, and the substance-over-form doctrine, to determine the income and expense from a rental agreement (including the proper allocation of fixed rent under a rental agreement).

3. Rental Agreements With Contingent Payments

The proposed regulations reserve guidance on the section 467 treatment of contingent rent, indicating that regulations addressing this issue would provide rules for contingent rent similar to those provided for computing original issue discount for contingent payment debt instruments in § 1.1275-4. The final regulations continue to reserve on the section 467 treatment of contingent payments. The IRS and Treasury Department expect that regulations under § 1.467-6 will be separately proposed, and continue to invite comments regarding the treatment of contingent rent and the application of

the § 1.1275-4 rules to section 467 rental agreements.

4. Recapture on Sale or Other Disposition of Property

Some commentators requested certain modifications and further clarification of the recapture rules under section 467(c) in the case of dispositions by gift, transfers at death, and certain tax-free transactions. In response to these comments, additional rules and examples illustrating those rules are provided in the final regulations.

The purpose of the additional rules is to place the transferee in the same tax position upon the subsequent disposition of the leased property as the transferor would have been in if the transferor had not transferred the property to the transferee. For example, if property subject to a section 467 rental agreement is transferred in a transaction subject to section 351, and if the transferor would have recognized section 467(c) recapture upon a taxable disposition of the property, the transferee may be subject to recapture upon a subsequent taxable disposition of the property. The amount of the recapture upon the subsequent taxable disposition will be determined by taking into account the section 467 rent and section 467 interest relating to the period of the transferor's ownership of the property. Thus, if a leaseback or long-term agreement provides for increasing rent but is not a disqualified leaseback or long-term agreement, a taxable disposition of the property by the transferee on or after the expiration of the lease term will not be subject to section 467(c) recapture. Alternatively, a taxable disposition of the property by the transferee before the expiration of the lease term will be subject to the same amount of section 467(c) recapture that would have applied if the transferor had continued to own the property.

5. Other Disposition Rules

The proposed regulations reserve guidance on whether special rules should be provided for transfers of property and leasehold interests in transactions in which gain or loss is not recognized in whole or in part. The IRS and Treasury Department believe, however, that special rules are not necessary in the case of nonrecognition transactions. As a general matter, because a section 467 loan is treated as indebtedness for all purposes of the Internal Revenue Code, the rules that apply to each of the nonrecognition provisions in cases where the property transferred is encumbered by indebtedness will apply to the transfer of property or a leasehold interest

subject to a section 467 loan. Further, if the section 467 loan represents an additional asset of the transferor, it is unlikely that any gain will be realized by the transferor because, in most cases, the basis of the loan will be equal to the sum of the principal amount of the loan and the accrued interest thereon. Thus, the provisions of the proposed regulations relating to special rules for transfers in nonrecognition transactions have been deleted.

6. Treatment of Modifications

The proposed regulations provide that, if the lessor and lessee agree to a substantial modification of the terms of an existing lease, the modified lease is generally treated as a new rental agreement for purposes of section 467. Thus, if the modified lease provides for increasing or decreasing rent, or deferred or prepaid rent, and the rent exceeds \$250,000, it is treated under the proposed regulations as a section 467 rental agreement, even if the pre-modification lease was not a section 467 rental agreement.

Some commentators requested additional guidance regarding whether a substantial modification of a lease has occurred, in view of the significant potential consequences of such a modification. In addition, the commentators suggested several types of modifications that, in their view, should not be treated as a substantial modification.

Other commentators indicated that the proposed regulations did not clarify whether only the remaining portion of the modified lease is to be taken into account for purposes of determining the section 467 rent and interest for rental periods following the modification.

The final regulations retain the general rule of the proposed regulations under which a rental agreement would be treated as a new lease for purposes of section 467 if the parties agreed to a substantial modification. Under the final regulations, if a substantial modification of a rental agreement occurs after June 3, 1996, the post-modification agreement is treated as a new agreement for purposes of determining whether the agreement is a section 467 rental agreement or a disqualified leaseback or long-term agreement and for purposes of applying the effective date provisions of the section 467 regulations. These rules do not apply, however, to a modification occurring on or before May 18, 1999, unless the rental agreement being modified is a post-June 3, 1996, disqualified leaseback or long-term agreement or the post-modification

agreement is a disqualified leaseback or long-term agreement.

In general, in determining whether a modified agreement is a section 467 rental agreement, or a disqualified leaseback or long-term agreement, the modified agreement is considered to consist only of the terms that relate to post-modification items (as described below). However, if a principal purpose of the modification is to avoid the purpose or intent of section 467 or the regulations thereunder, the Commissioner may treat the entire agreement (as modified) as a single agreement for purposes of section 467. The final regulations also provide that the post-modification agreement, notwithstanding its treatment as a new agreement, will be characterized, in certain cases, in the same manner as the agreement in effect before the modification. For example, if an agreement was a leaseback or was subject to constant rental accrual before its modification, the post-modification agreement will generally be treated as a leaseback or as subject to constant rental accrual. Similarly, if the agreement was a long-term agreement before its modification and the entire agreement (as modified) is a long-term agreement, the post-modification agreement will be treated as a long-term agreement.

The final regulations also provide rules for accounting for the effects of modifications occurring after May 18, 1999. In the case of a substantial modification, the lessor and lessee must take pre-modification items (generally, rent for periods before the modification, interest thereon, and payments allocable thereto (whether made before or after the modification)) into account under the method of accounting used before the modification. In computing section 467 rent, section 467 interest, and the amount of the section 467 loan with respect to post-modification items, only post-modification items are taken into account. In addition, the parties to the agreement are required to take into account adjustments necessary to prevent duplications and omissions resulting from the modification.

In the case of a modification that is not substantial, section 467 rent and interest for periods affected by the modification are determined under the terms of the entire agreement (as modified). In addition, the parties to the agreement are required to recompute the balance of the section 467 loan under the new terms and to take into account (as either additional rent or a reduction in rent previously taken into account) the change in the loan balance resulting from the modification. They are also required to take into account any

amount necessary to prevent duplications or omissions resulting from the modification.

The final regulations also provide additional guidance for determining whether a substantial modification of a lease has occurred, adopting some of the principles applicable to the modification of debt instruments under § 1.1001-3. Under the final regulations, all of the facts and circumstances will be examined to determine whether a substantial modification has occurred. Because this determination is inherently factual, the regulations do not provide more specific criteria for making this determination. However, in order to ensure that relatively insubstantial changes to the terms of a lease agreement and changes that do not implicate the policies of section 467 are not treated as substantial modifications under this rule, safe harbor provisions have been added.

In general, the modifications that are likely to affect the character of a rental agreement for purposes of section 467 are those that change the amount or timing of rent allocated or rent payable for the use of the property, or the identity of the taxpayer taking those amounts into account. Thus, a substantial modification will not result from changes in any provision for the payment of third-party costs or any other provision that is ignored for purposes of determining whether the agreement provides for contingent rents. In addition, the refinancing of a lessor's indebtedness on a leveraged lease will generally not be treated as a substantial modification of the lease, subject to compliance with certain conditions and limitations. These conditions and limitations are intended to permit refinancings to avoid classification as a substantial modification in circumstances where the primary objective of the lessee is to take advantage of favorable changes in interest rates.

In the case of a transfer of leased property by a lessor or a substitution of a lessee, the final regulations provide that the transfer or substitution will be treated as a substantial modification only if a principal purpose of the transaction is the avoidance of Federal income tax. In determining whether a transfer or substitution should be treated as a substantial modification, the safe harbors and other principles that generally apply in tax avoidance determinations are taken into account and the Commissioner may treat the post-modification agreement as a new agreement or treat the entire agreement (as modified) as a single agreement.

7. Definition of Lease Term

The proposed regulations provide that an option period, whether exercisable by the lessor or the lessee, is included in the lease term only if it is reasonably expected, as of the agreement date, that the option will be exercised. In contrast, Rev. Proc. 75-21 provides a comparable rule only for options that are exercisable by the lessee, while including the duration of all lessor renewal options in the lease term. The IRS and Treasury Department believe that nothing in section 467 justifies a deviation from the rule of Rev. Proc. 75-21 in this instance. Accordingly, for purposes of determining the term of a lease, the final regulations retain the rule of the proposed regulations only for lessee options, and treat all lessor options as if they had been exercised.

8. Effective Dates

The regulations are applicable for (1) disqualified leasebacks and long-term agreements entered into after June 3, 1996, and (2) other rental agreements entered into after May 18, 1999. No inference should be drawn concerning the treatment of rental agreements entered into before the regulations are applicable. Moreover, the IRS will, in appropriate circumstances, apply the provisions of section 467 requiring constant rental accrual to rental agreements entered into on or before June 3, 1996.

Some commentators requested that the effective date for disqualified leasebacks and long-term agreements be deferred so that the regulations would apply only to agreements entered into after the date on which final regulations are published in the **Federal Register**. The final regulations do not adopt this suggestion. The IRS and Treasury Department believe that the additional safe harbors provided in these regulations will prevent leasebacks and long-term agreements entered into after June 3, 1996, and on or before May 18, 1999 (the interim period), from being inappropriately disqualified in cases where the increasing or decreasing rents have not been motivated by tax avoidance. Some of these commentators also requested that the regulations not be applied to rental agreements entered into pursuant to a contract that was binding on the applicable effective date. The effective dates have been clarified in response to these comments.

Other commentators requested that taxpayers be permitted to rely on the provisions of the proposed regulations in the case of leasebacks and long-term agreements entered into during the interim period. According to these

commentators, the terms of certain leasebacks and long-term agreements entered into during the interim period were structured so as to comply with the safe harbors and other provisions of the proposed regulations in order to ensure that these agreements would not be treated as disqualified leasebacks or long-term agreements. In the absence of a provision permitting taxpayers to rely on the provisions of the proposed regulations in these cases, these agreements might lose their safe-harbor protection because of changes made in the final regulations. Accordingly, the final regulations permit taxpayers to rely on the provisions of the proposed regulations in the case of any leaseback or long-term agreement entered into during the interim period. No specific election is required in the case of an agreement subject to this provision.

9. Special Transitional Rule

Although the regulations do not apply to any rental agreement entered into on or before June 3, 1996, and do not apply to any rental agreement other than a disqualified leaseback or long-term agreement entered into on or before May 18, 1999, some commentators requested that they be allowed to change their method of accounting to the constant rental accrual method for rental agreements involving certain types of property financed by tax-exempt bonds where the agreements were entered into prior to the issuance of the section 467 regulations. The special rule was requested because, prior to the issuance of regulations, lessees had entered into rental agreements providing for disproportionately large payments of rent in the later years of the lease term, but without specific allocations of rents. In the view of the commentators, the circumstances in which a schedule of rent payments would be treated as a rent allocation schedule were not fully addressed by the legislative history.

In response to the comments, the final regulations contain a special transitional rule under which lessees may change their method of accounting for certain agreements to the constant rental accrual method. With respect to this special transitional rule, a lessee's change in its method of accounting for a rental agreement does not affect the method of accounting used by the lessor for the same agreement. In the case of similar rental agreements entered into after May 18, 1999, lessees will be able to obtain results comparable to the constant rental accrual method only by providing a specific allocation schedule that differs from the rent payment schedule.

10. Issues Not Addressed

The final regulations do not address the application of section 467 to payments for services. With respect to the possible application of section 467 to transactions sometimes referred to as "lease strips" or "stripping transactions", as described in Notice 95-53 (1995-2 C.B. 334), regulations under section 7701(l) were proposed after the issuance of the proposed regulations under section 467 setting forth the treatment of such transactions. Consequently, the IRS and Treasury Department believe that no specific guidance on the treatment of such transactions under section 467 is necessary.

The final regulations also do not provide guidance concerning the applicability of penalties or additions to tax when the Commissioner determines that a section 467 rental agreement should be treated as a disqualified leaseback or long-term agreement. No inference should be drawn from the failure to address the issue in these regulations concerning the Commissioner's authority to impose applicable penalties and additions to tax in such circumstances.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

Drafting Information: The principal author of these regulations is Forest Boone of the Office of Assistant Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *
 § 1.467-1 is also issued under 26 U.S.C. 467.
 § 1.467-2 is also issued under 26 U.S.C. 467.
 § 1.467-3 is also issued under 26 U.S.C. 467.
 § 1.467-4 is also issued under 26 U.S.C. 467.
 § 1.467-5 is also issued under 26 U.S.C. 467.
 § 1.467-6 is also issued under 26 U.S.C. 467.
 § 1.467-7 is also issued under 26 U.S.C. 467.
 § 1.467-8 is also issued under 26 U.S.C. 467.
 § 1.467-9 is also issued under 26 U.S.C. 467. * * *

Par. 2. In § 1.61-8, the first sentence of paragraph (b) is revised to read as follows:

§ 1.61-8 Rents and royalties.

* * * * *
 (b) * * * Except as provided in section 467 and the regulations thereunder, gross income includes advance rentals, which must be included in income for the year of receipt regardless of the period covered or the method of accounting employed by the taxpayer. * * *

Par. 3. In § 1.451-1, paragraph (g) is added to read as follows:

§ 1.451-1 General rule for taxable year of inclusion.

* * * * *
 (g) *Timing of income from section 467 rental agreements.*

For the timing of income with respect to section 467 rental agreements, see section 467 and the regulations thereunder.

Par. 4. Section 1.461-1 is amended by:

1. Adding a sentence at the end of paragraph (a)(1).
 2. Adding paragraph (a)(2)(iii)(E).
- The additions read as follows:

§ 1.461-1 General rule for taxable year of deduction.

(a) * * *
 (1) * * * See section 467 and the regulations thereunder for rules under which a liability arising out of the use of property pursuant to a section 467 rental agreement is taken into account.
 (2) * * *
 (iii) * * *
 (E) Except as otherwise provided by regulations or other published guidance

issued by the Commissioner (See § 601.601(b)(2) of this chapter), in the case of a liability arising out of the use of property pursuant to a section 467 rental agreement, the all events test (including economic performance) is considered met in the taxable year in which the liability is to be taken into account under section 467 and the regulations thereunder.

* * * * *

Par. 5. Section 1.461-4 is amended by:

1. Redesignating the text of paragraph (d)(3)(ii) following the heading as paragraph (d)(3)(ii)(A) and adding a heading for newly designated paragraph (d)(3)(ii)(A).

2. Adding paragraph (d)(3)(ii)(B).

3. Adding two sentences at the end of the introductory text of paragraph (d)(7). The additions read as follows:

§ 1.461-4 Economic performance.

* * * * *

(d) * * *
 (3) * * *

(ii) *Exceptions—(A) Volume, frequency of use, or income.* * * *

(B) *Section 467 rental agreements.* In the case of a liability arising out of the use of property pursuant to a section 467 rental agreement, economic performance occurs as provided in § 1.461-1(a)(2)(iii)(E).

* * * * *

(7) * * * Assume further that the examples do not involve section 467 rental agreements and, therefore, section 467 is not applicable. The examples are as follows:

* * * * *

Par. 6. Sections 1.467-0 through 1.467-9 are added to read as follows:

§ 1.467-0 Table of contents.

This section lists the captions that appear in §§ 1.467-1 through 1.467-9.

§ 1.467-1 *Treatment of lessors and lessees generally.*

- (a) Overview.
 - (1) In general.
 - (2) Cases in which rules are inapplicable.
 - (3) Summary of rules.
 - (i) Basic rules.
 - (ii) Special rules.
 - (4) Scope of rules.
 - (5) Application of other authorities.
- (b) Method of accounting for section 467 rental agreements.
- (c) Section 467 rental agreements.
 - (1) In general.
 - (2) Increasing or decreasing rent.
 - (i) Fixed rent.
 - (A) In general.
 - (B) Certain rent holidays disregarded.
 - (ii) Fixed rent allocated to a rental period.
 - (A) Specific allocation.
 - (I) In general.
 - (2) Rental agreements specifically allocating fixed rent.

- (B) No specific allocation.
 (iii) Contingent rent.
 (A) In general.
 (B) Certain contingent rent disregarded.
 (3) Deferred or prepaid rent.
 (i) Deferred rent.
 (ii) Prepaid rent.
 (iii) Rent allocated to a calendar year.
 (iv) Examples.
 (4) Rental agreements involving total payments of \$250,000 or less.
 (i) In general.
 (ii) Special rules in computing amount described in paragraph (c)(4)(i) of this section.
- (d) Section 467 rent.
 (1) In general.
 (2) Fixed rent for a rental period.
 (i) Constant rental accrual.
 (ii) Proportional rental accrual.
 (iii) Section 467 rental agreement accrual.
- (e) Section 467 interest.
 (1) In general.
 (2) Interest on fixed rent for a rental period.
 (i) In general.
 (ii) Section 467 rental agreements with adequate interest.
 (3) Treatment of interest.
- (f) Substantial modification of a rental agreement.
 (1) Treatment as new agreement.
 (i) In general.
 (ii) Limitation.
 (2) Post-modification agreement; in general.
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 (4) Special rules.
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 (iii) Carryover of character; disqualified agreements.
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 (v) Difference between aggregate rent and interest and aggregate payments.
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 (vi) Principal purpose of tax avoidance.
 (5) Definitions.
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 (7) Special rules for certain transfers.
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- (g) Treatment of amounts payable by lessor to lessee.
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 (2) Other amounts. [Reserved]
- (h) Meaning of terms.
 (i) [Reserved]
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 (2) Conventions regarding timing of rent and payments.
 (i) In general.
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 (3) Annualized fixed rent.
 (4) Allocation of fixed rent within a period.
 (5) Rental period length.
- § 1.467-2 Rent accrual for section 467 rental agreements without adequate interest.*
 (a) Section 467 rental agreements for which proportional rental accrual is required.
 (b) Adequate interest on fixed rent.
 (1) In general.
 (2) Section 467 rental agreements that provide for a variable rate of interest.
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 (1) In general.
 (2) Section 467 rental agreements that provide for a variable rate of interest.
 (d) Present value.
 (e) Applicable Federal rate.
 (1) In general.
 (2) Source of applicable Federal rates.
 (3) 110 percent of applicable Federal rate.
 (4) Term of the section 467 rental agreement.
 (i) In general.
 (ii) Section 467 rental agreements with variable interest.
 (f) Examples.
- § 1.467-3 Disqualified leasebacks and long-term agreements.*
 (a) General rule.
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 (2) Leaseback.
 (3) Long-term agreement.
 (i) In general.
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 (A) In general.
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 (2) Tax avoidance.
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 (d) Calculating constant rental amount.
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- § 1.467-4 Section 467 loan.*
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 (2) No section 467 loan in the case of certain section 467 rental agreements.
 (3) Rental agreements subject to constant rental accrual.
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- (iv) Coordination with rules relating to dispositions and assignments.
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- (2) Other modifications.
- (i) Computation of section 467 loan for modified agreement.
- (ii) Change in balance of section 467 loan.
- (iii) Section 467 rent and interest after the modification.
- (iv) Applicable Federal rate.
- (v) Modification effective within a rental period.
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- (viii) Exception for agreements entered into prior to effective date of section 467.
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- (4) Effective date of modification.
- (5) Examples.
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 - (2) Example.

§ 1.467-8 Automatic consent to change to constant rental accrual for certain rental agreements.

- (a) General rule.
- (b) Agreements to which automatic consent applies.

§ 1.467-9 Effective dates and automatic method changes for certain agreements.

- (a) In general.
- (b) Automatic consent for certain rental agreements.
- (c) Application of regulation project IA-292-84 to certain leasebacks and long-term agreements.
- (d) Entered into.
- (e) Change in method of accounting.
 - (1) In general.
 - (2) Application of regulation project IA-292-84.
 - (3) Automatic change procedures.

§ 1.467-1 Treatment of lessors and lessees generally.

(a) *Overview*—(1) *In general*. When applicable, section 467 requires a lessor and lessee of tangible property to treat rents consistently and to use the accrual method of accounting (and time value of money principles) regardless of their overall method of accounting. In addition, in certain cases involving tax avoidance, the lessor and lessee must take rent and stated or imputed interest into account under a constant rental accrual method, pursuant to which the rent is treated as accruing ratably over the entire lease term.

(2) *Cases in which rules are inapplicable*. Section 467 applies only to leases (or other similar arrangements) that constitute section 467 rental agreements as defined in paragraph (c) of this section. For example, a rental agreement is not a section 467 rental agreement, and, therefore, is not subject to the provisions of this section and §§ 1.467-2 through 1.467-9 (the section 467 regulations), if it specifies equal

amounts of rent for each month throughout the lease term and all payments of rent are due in the calendar year to which the rent relates (or in the preceding or succeeding calendar year). In addition, the section 467 regulations do not apply to a rental agreement that requires total rents of \$250,000 or less. For purposes of determining whether the agreement has total rents of \$250,000 or less, certain specified contingent rent is disregarded.

(3) *Summary of rules*—(i) *Basic rules*. Paragraph (c) of this section provides rules for determining whether a rental agreement is a section 467 rental agreement. Paragraphs (d) and (e) of this section provide rules for determining the amount of rent and interest, respectively, required to be taken into account by a lessor and lessee under a section 467 rental agreement. Paragraphs (f) through (h) and (j) of this section provide various definitions and special rules relating to the application of the section 467 regulations. Paragraph (i) of this section is reserved.

(ii) *Special rules*. Section 1.467-2 provides rules for section 467 rental agreements that have deferred or prepaid rents without providing for adequate interest. Section 1.467-3 provides rules for application of the constant rental accrual method, including criteria for determining whether an agreement is subject to this method. Section 1.467-4 provides rules for establishing and adjusting a section 467 loan (the amount that a lessor is deemed to have loaned to the lessee, or vice versa, pursuant to the application of the section 467 regulations). Section 1.467-5 provides rules for applying the section 467 regulations where a rental agreement requires payments of interest at a variable rate. Section 1.467-6, relating to the treatment of certain section 467 rental agreements with contingent payments, is reserved. Section 1.467-7 provides rules for the treatment of dispositions by a lessor of property subject to a section 467 rental agreement and the treatment of assignments by lessees and certain lessee-financed renewals of a section 467 rental agreement. Section 1.467-7 also provides rules for the treatment of modified rental agreements. Section 1.467-8 provides special transitional rules relating to the method of accounting for certain rental agreements entered into on or before May 18, 1999. Finally, § 1.467-9 provides the effective date rules for the section 467 regulations.

(4) *Scope of rules*. No inference should be drawn from any provision of this section or §§ 1.467-2 through 1.467-9 concerning whether—

(i) For Federal tax purposes, an arrangement constitutes a lease; or

(ii) For Federal tax purposes, any obligation of the lessee under a rental agreement is treated as rent.

(5) *Application of other authorities*. Notwithstanding section 467 and the regulations thereunder, other authorities such as section 446(b) clear-reflection-of-income principles, section 482, and the substance-over-form doctrine, may be applied by the Commissioner to determine the income and expense from a rental agreement (including the proper allocation of fixed rent under a rental agreement).

(b) *Method of accounting for section 467 rental agreements*. If a rental agreement is a section 467 rental agreement, as described in paragraph (c) of this section, the lessor and lessee must each take into account for any taxable year the sum of—

(1) The section 467 rent for the taxable year (as defined in paragraph (d) of this section); and

(2) The section 467 interest for the taxable year (as defined in paragraph (e) of this section).

(c) *Section 467 rental agreements*—(1) *In general*. Except as otherwise provided in paragraph (c)(4) of this section, the term *section 467 rental agreement* means a rental agreement, as defined in paragraph (h)(12) of this section, that has increasing or decreasing rents (as described in paragraph (c)(2) of this section), or deferred or prepaid rents (as described in paragraph (c)(3) of this section).

(2) *Increasing or decreasing rent*—(i) *Fixed rent*—(A) *In general*. A rental agreement has increasing or decreasing rent if the annualized fixed rent, as described in paragraph (j)(3) of this section, allocated to any rental period exceeds the annualized fixed rent allocated to any other rental period in the lease term.

(B) *Certain rent holidays disregarded*. Notwithstanding the provisions of paragraph (c)(2)(i)(A) of this section, a rental agreement does not have increasing or decreasing rent if the increasing or decreasing rent is solely attributable to a rent holiday provision allowing reduced rent (or no rent) for a period of three months or less at the beginning of the lease term.

(ii) *Fixed rent allocated to a rental period*—(A) *Specific allocation*—(1) *In general*. If a rental agreement provides a specific allocation of fixed rent, as described in paragraph (c)(2)(ii)(A)(2) of this section, the amount of fixed rent allocated to each rental period during the lease term is the amount of fixed rent allocated to that period by the rental agreement.

(2) *Rental agreements specifically allocating fixed rent.* A rental agreement specifically allocates fixed rent if the rental agreement unambiguously specifies, for periods no longer than a year, a fixed amount of rent for which the lessee becomes liable on account of the use of the property during that period, and the total amount of fixed rent specified is equal to the total amount of fixed rent payable under the lease. For example, a rental agreement providing that rent is \$100,000 per calendar year, and providing for total payments of fixed rent equal to the total amount specified, specifically allocates rent. A rental agreement stating only when rent is payable does not specifically allocate rent.

(B) *No specific allocation.* If a rental agreement does not provide a specific allocation of fixed rent (for example, because the total amount of fixed rent specified is not equal to the total amount of fixed rent payable under the lease), the amount of fixed rent allocated to a rental period is the amount of fixed rent payable during that rental period. If an amount of fixed rent is payable before the beginning of the lease term, it is allocated to the first rental period in the lease term. If an amount of fixed rent is payable after the end of the lease term, it is allocated to the last rental period in the lease term.

(iii) *Contingent rent*—(A) *In general.* A rental agreement has increasing or decreasing rent if it requires (or may require) the payment of contingent rent (as defined in paragraph (h)(2) of this section), other than contingent rent described in paragraph (c)(2)(iii)(B) of this section.

(B) *Certain contingent rent disregarded.* For purposes of this paragraph (c)(2)(iii), rent is disregarded to the extent it is contingent as the result of one or more of the following provisions—

(1) A qualified percentage rents provision, as defined in paragraph (h)(8) of this section;

(2) An adjustment based on a reasonable price index, as defined in paragraph (h)(10) of this section;

(3) A provision requiring the lessee to pay third-party costs, as defined in paragraph (h)(15) of this section;

(4) A provision requiring the payment of late payment charges, as defined in paragraph (h)(4) of this section;

(5) A loss payment provision, as defined in paragraph (h)(7) of this section;

(6) A qualified TRAC provision, as defined in paragraph (h)(9) of this section;

(7) A residual condition provision, as defined in paragraph (h)(13) of this section;

(8) A tax indemnity provision, as defined in paragraph (h)(14) of this section;

(9) A variable interest rate provision, as defined in paragraph (h)(16) of this section; or

(10) Any other provision provided in regulations or other published guidance issued by the Commissioner, but only if the provision is designated as contingent rent to be disregarded for purposes of this paragraph (c)(2)(iii).

(3) *Deferred or prepaid rent*—(i) *Deferred rent.* A rental agreement has deferred rent under this paragraph (c)(3) if the cumulative amount of rent allocated as of the close of a calendar year (determined under paragraph (c)(3)(iii) of this section) exceeds the cumulative amount of rent payable as of the close of the succeeding calendar year.

(ii) *Prepaid rent.* A rental agreement has prepaid rent under this paragraph (c)(3) if the cumulative amount of rent payable as of the close of a calendar year exceeds the cumulative amount of rent allocated as of the close of the succeeding calendar year (determined under paragraph (c)(3)(iii) of this section).

(iii) *Rent allocated to a calendar year.* For purposes of this paragraph (c)(3), the rent allocated to a calendar year is the sum of—

(A) The fixed rent allocated to any rental period (determined under paragraph (c)(2)(ii) of this section) that begins and ends in the calendar year;

(B) A ratable portion of the fixed rent allocated to any other rental period that begins or ends in the calendar year; and

(C) Any contingent rent that accrues during the calendar year.

(iv) *Examples.* The following examples illustrate the application of this paragraph (c)(3):

Example 1. (i) A and B enter into a rental agreement that provides for the lease of property to begin on January 1, 2000, and end on December 31, 2003. The rental agreement provides that rent of \$100,000 accrues during each year of the lease term. Under the rental agreement, no rent is payable during calendar year 2000, a payment of \$100,000 is to be made on December 31, 2001, and December 31, 2002, and a payment of \$200,000 is to be made on December 31, 2003. A and B both select the calendar year as their rental period. Thus, the amount of rent allocated to each rental period under paragraph (c)(2)(ii) of this section is \$100,000. Therefore, the rental agreement does not have increasing or decreasing rent as described in paragraph (c)(2)(i) of this section.

(ii) Under paragraph (c)(3)(i) of this section, a rental agreement has deferred rent

if, at the close of a calendar year, the cumulative amount of rent allocated under paragraph (c)(3)(iii) of this section exceeds the cumulative amount of rent payable as of the close of the succeeding year. In this example, there is no deferred rent: the rent allocated to 2000 (\$100,000) does not exceed the cumulative rent payable as of December 31, 2001 (\$100,000); the rent allocated to 2001 and preceding years (\$200,000) does not exceed the cumulative rent payable as of December 31, 2002 (\$200,000); the rent allocated to 2002 and preceding years (\$300,000) does not exceed the cumulative rent payable as of December 31, 2003 (\$400,000); and the rent allocated to 2003 and preceding years (\$400,000) does not exceed the cumulative rent payable as of December 31, 2004 (\$400,000). Therefore, because the rental agreement does not have increasing or decreasing rent and does not have deferred or prepaid rent, the rental agreement is not a section 467 rental agreement.

Example 2. (i) A and B enter into a rental agreement that provides for a 10-year lease of personal property, beginning on January 1, 2000, and ending on December 31, 2009. The rental agreement provides for accruals of rent of \$10,000 during each month of the lease term. Under paragraph (c)(3)(iii) of this section, \$120,000 is allocated to each calendar year. The rental agreement provides for a \$1,200,000 payment on December 31, 2000.

(ii) The rental agreement does not have increasing or decreasing rent as described in paragraph (c)(2)(i) of this section. The rental agreement, however, provides prepaid rent under paragraph (c)(3)(ii) of this section because the cumulative amount of rent payable as of the close of a calendar year exceeds the cumulative amount of rent allocated as of the close of the succeeding calendar year. For example, the cumulative amount of rent payable as of the close of 2000 (\$1,200,000) is payable on December 31, 2000) exceeds the cumulative amount of rent allocated as of the close of 2001, the succeeding calendar year (\$240,000). Accordingly, the rental agreement is a section 467 rental agreement.

(4) *Rental agreements involving total payments of \$250,000 or less*—(i) *In general.* A rental agreement is not a section 467 rental agreement if, as of the agreement date (as defined in paragraph (h)(1) of this section), it is not reasonably expected that the sum of the aggregate amount of rental payments under the rental agreement and the aggregate value of all other consideration to be received for the use of property (taking into account any payments of contingent rent, and any other contingent consideration) will exceed \$250,000.

(ii) *Special rules in computing amount described in paragraph (c)(4)(i) of this section of this section.* The following rules apply in determining the amount described in paragraph (c)(4)(i) of this section:

(A) Stated interest on deferred rent is not taken into account. However, the Commissioner may recharacterize a portion of stated interest as additional rent if a rental agreement provides for interest on deferred rent at a rate that, in light of all of the facts and circumstances, is clearly greater than the arm's-length rate of interest that would have been charged in a lending transaction between the lessor and lessee.

(B) Consideration that does not involve a cash payment is taken into account at its fair market value. A liability that is either assumed or secured by property acquired subject to the liability is taken into account at the sum of its remaining principal amount and accrued interest (if any) thereon or, in the case of an obligation originally issued at a discount, at the sum of its adjusted issue price and accrued qualified stated interest (if any), within the meaning of § 1.1273-1(c)(1).

(C) All rental agreements that are part of the same transaction or a series of related transactions involving the same lessee (or any related person) and the same lessor (or any related person) are treated as a single rental agreement. Whether two or more rental agreements are part of the same transaction or a series of related transactions depends on all the facts and circumstances.

(D) If an agreement includes a provision increasing or decreasing rent payable solely as a result of an adjustment based on a reasonable price index, the amount described in paragraph (c)(4)(i) of this section must be determined as if the applicable price index did not change during the lease term.

(E) If an agreement includes a variable interest rate provision (as defined in paragraph (h)(16) of this section), the amount described in paragraph (c)(4)(i) of this section must be determined by using fixed rate substitutes (determined in the same manner as under § 1.1275-5(e), treating the agreement date as the issue date) for the variable rates of interest applicable to the lessor's indebtedness.

(F) Contingent rent described in paragraphs (c)(2)(iii)(B)(3) through (8) of this section is not taken into account.

(d) *Section 467 rent*—(1) *In general.* The section 467 rent for a taxable year is the sum of—

(i) The fixed rent for any rental period (determined under paragraph (d)(2) of this section) that begins and ends in the taxable year;

(ii) A ratable portion of the fixed rent for any other rental period beginning or ending in the taxable year; and

(iii) In the case of a section 467 rental agreement that provides for contingent rent, the contingent rent that accrues during the taxable year.

(2) *Fixed rent for a rental period*—(i) *Constant rental accrual.* In the case of a section 467 rental agreement that is a disqualified leaseback or long-term agreement (as described in § 1.467-3(b)), the fixed rent for a rental period is the constant rental amount (as determined under § 1.467-3(d)).

(ii) *Proportional rental accrual.* In the case of a section 467 rental agreement that is not described in paragraph (d)(2)(i) of this section, and does not provide adequate interest on fixed rent (as determined under § 1.467-2(b)), the fixed rent for a rental period is the proportional rental amount (as determined under § 1.467-2(c)).

(iii) *Section 467 rental agreement accrual.* In the case of a section 467 rental agreement that is not described in either paragraph (d)(2)(i) or (ii) of this section, the fixed rent for a rental period is the amount of fixed rent allocated to the rental period under the rental agreement, as determined under paragraph (c)(2)(ii) of this section.

(e) *Section 467 interest*—(1) *In general.* The section 467 interest for a taxable year is the sum of—

(i) The interest on fixed rent for any rental period that begins and ends in the taxable year;

(ii) A ratable portion of the interest on fixed rent for any other rental period beginning or ending in the taxable year; and

(iii) In the case of a section 467 rental agreement that provides for contingent rent, any interest that accrues on the contingent rent during the taxable year.

(2) *Interest on fixed rent for a rental period*—(i) *In general.* Except as provided in paragraph (e)(2)(ii) of this section and § 1.467-5(b)(1)(ii), the interest on fixed rent for a rental period is equal to the product of—

(A) The principal balance of the section 467 loan (as described in § 1.467-4(b)) at the beginning of the rental period; and

(B) The yield of the section 467 loan (as described in § 1.467-4(c)).

(ii) *Section 467 rental agreements with adequate interest.* Except in the case of a section 467 rental agreement that is a disqualified leaseback or long-term agreement, if a section 467 rental agreement provides adequate interest under § 1.467-2(b)(1)(i) (agreements with no deferred or prepaid rent) or § 1.467-2(b)(1)(ii) (agreements with adequate interest stated at a single fixed rate), the interest on fixed rent for a rental period is the amount of interest

provided in the rental agreement for the period.

(3) *Treatment of interest.* If the section 467 interest for a rental period is a positive amount, the lessor has interest income and the lessee has an interest expense. If the section 467 interest for a rental period is a negative amount, the lessee has interest income and the lessor has an interest expense. Section 467 interest is treated as interest for all purposes of the Internal Revenue Code.

(f) *Substantial modification of a rental agreement*—(1) *Treatment as new agreement*—(i) *In general.* If a substantial modification of a rental agreement occurs after June 3, 1996, the post-modification agreement is treated as a new agreement and the date on which the modification occurs is treated as the agreement date in applying section 467 and the regulations thereunder to the post-modification agreement. Thus, for example, the post-modification agreement is treated as a new agreement entered into on the date the modification occurs for purposes of determining whether it is a section 467 rental agreement under this section, whether it is a disqualified leaseback or long-term agreement under § 1.467-3, and whether it is entered into after the applicable effective date in § 1.467-9.

(ii) *Limitation.* In the case of a substantial modification of a rental agreement occurring on or before May 18, 1999, this paragraph (f) applies only if—

(A) The rental agreement was a disqualified leaseback or long-term agreement before the modification and the agreement date, determined without regard to the modification, is after June 3, 1996; or

(B) The post-modification agreement would, after application of the rules in this paragraph (f) (other than the special rule for disqualified agreements in paragraph (f)(4)(iii) of this section), be a disqualified leaseback or long-term agreement.

(2) *Post-modification agreement; in general.* For purposes of determining whether a post-modification agreement is a section 467 rental agreement or a disqualified leaseback or long-term agreement under paragraph (f)(1) of this section, the terms of the post-modification agreement are, except as provided in paragraph (f)(4) of this section, only those terms that provide for rights and obligations relating to post-modification items (within the meaning of paragraph (f)(5)(iv) of this section).

(3) *Other effects of a modification.* For rules relating to amounts that must be taken into account following certain modifications, see § 1.467-7(g).

(4) *Special rules*—(i) *Carryover of character; leasebacks.* If an agreement is a leaseback prior to its modification and the lessee prior to the modification (or a related person) is the lessee after the modification, the post-modification agreement is a leaseback even if the post-modification lessee did not have an interest in the property at any time during the two-year period ending on the date on which the modification occurs.

(ii) *Carryover of character; long-term agreements.* If an agreement is a long-term agreement prior to its modification and the entire agreement (as modified) would be a long-term agreement, the post-modification agreement is a long-term agreement.

(iii) *Carryover of character; disqualified agreements.* If an agreement (as in effect before its modification) is a disqualified leaseback or long-term agreement as the result of a determination (whether occurring before or after the modification) under § 1.467-3(b)(1)(ii) and the post-modification agreement is a section 467 rental agreement (or the entire agreement (as modified) would be a section 467 rental agreement), the post-modification agreement will, notwithstanding its treatment as a new agreement under paragraph (f)(1)(i) of this section, be subject to constant rental accrual unless the Commissioner determines that, because of the absence of tax avoidance potential, the post-modification agreement should not be treated as a disqualified leaseback or long-term agreement.

(iv) *Allocation of rent.* If the entire agreement (as modified) provides a specific allocation of fixed rent, as described in paragraph (c)(2)(ii)(A)(2) of this section, the post-modification agreement is treated as an agreement that provides a specific allocation of fixed rent. If the entire agreement (as modified) does not provide a specific allocation of fixed rent, the fixed rent allocated to rental periods during the lease term of the post-modification agreement is determined by applying the rules of paragraph (c)(2)(ii)(B) of this section to the entire agreement (as modified).

(v) *Difference between aggregate rent and interest and aggregate payments*—(A) *In general.* Except as provided in paragraph (f)(4)(v)(B) of this section, a post-modification agreement described in paragraph (f)(4)(v)(C) of this section is treated as a section 467 rental agreement subject to proportional rental accrual (determined under § 1.467-2(c)).

(B) *Constant rental accrual prior to the modification.* A post-modification agreement described in paragraph

(f)(4)(v)(C) of this section is treated as a section 467 rental agreement subject to constant rental accrual if—

(1) Constant rental accrual is required under paragraph (f)(4)(iii) of this section; or

(2) The post-modification agreement involves total payments of more than \$250,000 (as described in paragraph (c)(4) of this section), and the Commissioner determines that the post-modification agreement is a disqualified leaseback or long-term agreement.

(C) *Agreements described in this paragraph (f)(4)(v)(C).* A post-modification agreement is described in this paragraph (f)(4)(v)(C) if the aggregate amount of fixed rent and stated interest treated as post-modification items does not equal the aggregate amount of payments treated as post-modification items.

(vi) *Principal purpose of tax avoidance.* If a principal purpose of a substantial modification is to avoid the purpose or intent of section 467 or the regulations thereunder, the Commissioner may treat the entire agreement (as modified) as a single agreement for purposes of section 467 and the regulations thereunder.

(5) *Definitions.* The following definitions apply for purposes of this paragraph (f) and § 1.467-7(g):

(i) A *modification* of a rental agreement is any alteration, including any deletion or addition, in whole or in part, of a legal right or obligation of the lessor or lessee thereunder, whether the alteration is evidenced by an express agreement (oral or written), conduct of the parties, or otherwise.

(ii) A modification is *substantial* only if, based on all of the facts and circumstances, the legal rights or obligations that are altered and the degree to which they are altered are economically substantial. A modification of a rental agreement will not be treated as substantial solely because it is not described in paragraph (f)(6) of this section.

(iii) A modification *occurs* on the earlier of the first date on which there is a binding contract that substantially sets forth the terms of the modification or the date on which agreement to such terms is otherwise evidenced.

(iv) *Post-modification items* with respect to any modification of a rental agreement are all items (other than pre-modification items) provided under the terms of the entire agreement (as modified).

(v) *Pre-modification items* with respect to any modification of a rental agreement are pre-modification rent, interest thereon, and payments allocable

thereto (whether payable before or after the modification.) For this purpose—

(A) Pre-modification rent is rent allocable to periods before the effective date of the modification, but only to the extent such rent is payable under the entire agreement (as modified) at the time such rent was due under the agreement in effect before the modification; and

(B) Pre-modification items are identified by applying payments, in the order payable under the entire agreement (as modified) unless the agreement specifies otherwise, to rent and interest thereon in the order in which amounts accrue.

(vi) The *entire agreement (as modified)* with respect to any modification is the agreement consisting of pre-modification terms providing for rights and obligations that are not affected by the modification and post-modification terms providing for rights and obligations that differ from the rights and obligations under the agreement in effect before the modification. For example, if a 10-year rental agreement that provides for rent of \$25,000 per year is modified at the end of the 5th year to provide for rent of \$30,000 per year in subsequent years, the entire agreement (as modified) provides for a 10-year lease term and provides for rent of \$25,000 per year in years 1 through 5 and rent of \$30,000 per year in years 6 through 10. The result would be the same if the modification provided for both the increase in rent and the substitution of a new lessee.

(6) *Safe harbors.* Notwithstanding the provisions of paragraph (f)(5) of this section, a modification of a rental agreement is not a substantial modification if the modification occurs solely as the result of one or more of the following—

(i) The refinancing of any indebtedness incurred by the lessor to acquire the property subject to the rental agreement and secured by such property (or any refinancing thereof) but only if all of the following conditions are met—

(A) Neither the amount, nor the time for payment, of the principal amount of the new indebtedness differs from the amount and time for payment of the remaining principal amount of the refinanced indebtedness, except for de minimis changes;

(B) For each of the remaining rental periods, the rent allocation schedule, the payments of rent and interest, and the amount accrued under section 467 are changed only to the extent necessary to take into account the change in financing costs, and such changes are made pursuant to the terms of the rental

agreement in effect before the modification;

(C) The lessor and the lessee are not related persons to each other or to any lender to the lessor with respect to the property (whether under the refinanced indebtedness or the new indebtedness); and

(D) With respect to the indebtedness being refinanced, the lessor was granted a unilateral option (within the meaning of § 1.1001-3(c)(3)) by the creditor to repay the refinanced indebtedness, exercisable with or without the lessee's consent;

(ii) A change in the obligation of the lessee to make any of the contingent payments described in paragraphs (c)(2)(iii)(B)(3) through (8) of this section; or

(iii) A change in the amount of fixed rent allocated to a rental period that, when combined with all previous changes in the amount of fixed rent allocated to the rental period, does not exceed one percent of the fixed rent allocated to that rental period prior to the modification.

(7) *Special rules for certain transfers*—(i) *In general.* For purposes of this paragraph (f), a substitution of a new lessee or a sale, exchange, or other disposition by a lessor of property subject to a rental agreement will not, by itself, be treated as a substantial modification unless a principal purpose of the transaction giving rise to the modification is the avoidance of Federal income tax. In determining whether a principal purpose of the transaction giving rise to the modification is the avoidance of Federal income tax—

(A) The safe harbors and other principles of § 1.467-3(c) are taken into account; and

(B) The Commissioner may treat the post-modification agreement as a new agreement or treat the entire agreement (as modified) as a single agreement.

(ii) *Exception.* Notwithstanding the provisions of paragraph (f)(7)(i) of this section, the continuing lessor and the new lessee (in the case of a substitution of a new lessee) or the new lessor and the continuing lessee (in the case of a sale, exchange, or other disposition by a lessor of property subject to a rental agreement) may, in appropriate cases, request the Commissioner to treat the transaction as if it were a substantial modification in order to have the provisions of paragraph (f)(4)(iii) of this section and § 1.467-7(g)(1) apply to the transaction.

(g) *Treatment of amounts payable by lessor to lessee*—(1) *Interest.* For purposes of determining present value, any amounts payable by the lessor to the

lessee as interest on prepaid rent are treated as negative amounts.

(2) *Other amounts.* [Reserved]

(h) *Meaning of terms.* The following meanings apply for purposes of this section and §§ 1.467-2 through 1.467-9:

(1) *Agreement date* means the earlier of the lease date or the first date on which there is a binding written contract that substantially sets forth the terms under which the property will be leased.

(2) *Contingent rent* means any rent that is not fixed rent, including any amount reflecting an adjustment based on a reasonable price index (as defined in paragraph (h)(10) of this section) or a variable interest rate provision (as defined in paragraph (h)(16) of this section).

(3) *Fixed rent* means any rent to the extent its amount and the time at which it is required to be paid are fixed and determinable under the terms of the rental agreement as of the lease date. The following rules apply for the purpose of determining the extent to which rent is fixed rent:

(i) The possibility of a breach, default, or other early termination of the rental agreement and any adjustments based on a reasonable price index or a variable interest rate provision are disregarded.

(ii) Rent will not fail to be treated as fixed rent merely because of the possibility of impairment by insolvency, bankruptcy, or other similar circumstances.

(iii) If the lease term (as defined in paragraph (h)(6) of this section) includes one or more periods as to which either the lessor or the lessee has an option to renew or extend the term of the agreement, rent will not fail to be treated as fixed rent merely because the option has not been exercised.

(iv) If the lease term includes one or more periods during which a substitute lessee or lessor may have use of the property, rent will not fail to be treated as fixed rent merely because the contingencies relating to the obligation of the lessee (or a related person) to make payments in the nature of rent have not occurred.

(v) If either the lessor or the lessee has an unconditional option or options, exercisable on one or more dates during the lease term, that, if exercised, require payments of rent to be made under an alternative payment schedule or schedules, the amount of fixed rent and the dates on which such rent is required to be paid are determined on the basis of the payment schedule that, as of the agreement date, is most likely to occur. If payments of rent are made under an alternative payment schedule that differs from the payment schedule

assumed in applying the preceding sentence, then, for purposes of paragraph (f) of this section, the rental agreement is treated as having been modified at the time the option to make payments on such alternative schedule is exercised.

(4) *Late payment charge* means any amount required to be paid by the lessee to the lessor as additional compensation for the lessee's failure to make any payment of rent under a rental agreement when due.

(5) *Lease date* means the date on which the lessee first has the right to use of the property that is the subject of the rental agreement.

(6) *Lease term* means the period during which the lessee has use of the property subject to the rental agreement, including any option to renew or extend the term of the agreement other than an option, exercisable by the lessee, as to which it is reasonably expected, as of the agreement date, that the option will not be exercised. The lessor's or lessee's determination that an option period is either included in or excluded from the lease term is not binding on the Commissioner. If the lessee (or a related person) agrees that one or both of them will or could be obligated to make payments in the nature of rent (within the meaning of § 1.168(i)-2(b)(2)) for a period when another lessee (the substitute lessee) or the lessor will have use of the property subject to the rental agreement, the Commissioner may, in appropriate cases, treat the period when the substitute lessee or lessor will have use of the property as part of the lease term. See § 1.467-7(f) for special rules applicable to the lessee, substitute lessee, and lessor.

(7) A *loss payment provision* means a provision that requires the lessee to pay the lessor a sum of money (which may be either a stipulated amount or an amount determined by reference to a formula or other objective measure) if the property subject to the rental agreement is lost, stolen, damaged or destroyed, or otherwise rendered unsuitable for any use (other than for scrap purposes).

(8) A *qualified percentage rents provision* means a provision pursuant to which the rent is equal to a fixed percentage of the lessee's receipts or sales (whether or not receipts or sales are adjusted for returned merchandise or Federal, state, or local sales taxes), but only if the percentage does not vary throughout the lease term. A provision will not fail to be treated as a qualified percentage rents provision solely by reason of one or more of the following additional terms:

(i) Differing percentages of receipts or sales apply to different departments or separate floors of a retail store, but only if the percentage applicable to a particular department or floor does not vary throughout the lease term.

(ii) The percentage is applied to receipts or sales in excess of determinable dollar amounts, but only if the determinable dollar amounts are fixed and do not vary throughout the lease term.

(9) A *qualified TRAC provision* means a terminal rental adjustment clause (as defined in section 7701(h)(3)) contained in a qualified motor vehicle operating agreement (as defined in section 7701(h)(2)), but only if the adjustment to the rental price is based on a reasonable estimate, determined as of any date between the agreement date and the lease date (or, in the event the agreement date is the same as or later than the lease date, determined as of the agreement date), of the fair market value of the motor vehicle (including any trailer) at the end of the lease term.

(10) An adjustment is based on a *reasonable price index* if the adjustment reflects inflation or deflation occurring over a period during the lease term and is determined consistently under a generally recognized index for measuring inflation or deflation (for example, the non-seasonally adjusted U.S. City Average All Items Consumer Price Index for All Urban Consumers (CPI-U), which is published by the Bureau of Labor Statistics of the Department of Labor). An adjustment will not fail to be treated as one that is based on a reasonable price index merely because the adjustment may be limited to a fixed percentage, but only if the parties reasonably expect, as of any date between the agreement date and the lease date (or, in the event the agreement date is the same as the lease date, as of such date), that the fixed percentage will actually limit the amount of the rent payable during less than 50 percent of the lease term.

(11) For purposes of determining whether a section 467 rental agreement is a leaseback within the meaning of § 1.467-3(b)(2), two persons are *related persons* if they are related persons within the meaning of section 465(b)(3)(C). In all other cases, two persons are *related persons* if they either have a relationship to each other that is specified in section 267(b) or section 707(b)(1) or are related entities within the meaning of sections 168(h)(4)(A), (B), or (C).

(12) *Rental agreement* includes any agreement, whether written or oral, that provides for the use of tangible property

and is treated as a lease for Federal income tax purposes.

(13) A *residual condition provision* means a provision in a rental agreement that requires a payment to be made by either the lessor or the lessee to the other party based on the difference between the actual condition of the property subject to the agreement, determined as of the expiration of the lease term, and the expected condition of the property at the expiration of the lease term, as set forth in the rental agreement. The amount of any such payment may be determined by reference to any objective measure relating to the use or condition of the property, such as miles, hours or other duration of use, units of production, or similar measure. A provision will be treated as a residual condition provision only if the payment represents compensation for the use of, or wear and tear on, the property in excess of, or below, a standard set forth in the rental agreement, and the standard is reasonably expected, as of any date between the agreement date and the lease date (or, in the event the agreement date is the same as or later than the lease date, as of the agreement date), to be met at the expiration of the lease term.

(14) A *tax indemnity provision* means a provision in a rental agreement that may require the lessee to make one or more payments to the lessor in the event that the Federal, foreign, state, or local income tax consequences actually realized by a lessor from owning the property subject to the rental agreement and leasing it to the lessee differ from the consequences reasonably expected by the lessor, but only if the differences in such consequences result from a misrepresentation, act, or failure to act on the part of the lessee, or any other factor not within the control of the lessor or any related person.

(15) *Third-party costs* include any real estate taxes, insurance premiums, maintenance costs, and any other costs (excluding a debt service cost) that relate to the leased property and are not within the control of the lessor or lessee or any person related to the lessor or lessee.

(16) A *variable interest rate provision* means a provision in a rental agreement that requires the rent payable by the lessee to the lessor to be adjusted by the dollar amount of changes in the amount of interest payable by the lessor on any indebtedness that was incurred to acquire the property subject to the rental agreement (or any refinancing thereof), but—

(i) Only to the extent the changes are attributable to changes in the interest rate; and

(ii) Only if the indebtedness provides for interest at one or more qualified floating rates (within the meaning of § 1.1275-5(b)), or the changes are attributable to a refinancing at a fixed rate or one or more qualified floating rates.

(i) [Reserved].

(j) *Computational rules*. For purposes of this section and §§ 1.467-2 through 1.467-9, the following rules apply—

(1) *Counting conventions*. Any reasonable counting convention may be used (for example, 30 days per month/360 days per year) to determine the length of a rental period or to perform any computation. Rental periods of the same descriptive length, for example annual, semiannual, quarterly, or monthly, may be treated as being of equal length.

(2) *Conventions regarding timing of rent and payments*—(i) *In general*. For purposes of determining present values and yield only, except as otherwise provided in this section and §§ 1.467-2 through 1.467-8—

(A) The rent allocated to a rental period is taken into account on the last day of the rental period;

(B) Any amount payable during the first half of the first rental period is treated as payable on the first day of that rental period;

(C) Any amount payable during the first half of any other rental period is treated as payable on the last day of the preceding rental period;

(D) Any amount payable during the second half of a rental period is treated as payable on the last day of the rental period; and

(E) Any amount payable at the midpoint of a rental period is treated, in applying this paragraph (j)(2), as an amount payable during the first half of the rental period.

(ii) *Time amount is payable*. For purposes of this paragraph (j)(2), an amount is payable on the last day for timely payment (that is, the last day such amount may be paid without incurring interest, computed at an arm's-length rate, a substantial penalty, or other substantial detriment (such as giving the lessor the right to terminate the agreement, bring an action to enforce payment, or exercise other similar remedies under the terms of the agreement or applicable law)).

(3) *Annualized fixed rent*. Annualized fixed rent is determined by multiplying the fixed rent allocated to the rental period under paragraph (c)(2)(ii) of this section by the number of periods of the rental period's length in a calendar year.

Thus, if the fixed rent allocated to a rental period is \$10,000 and the rental period is one month, the annualized fixed rent for that rental period is \$120,000 (\$10,000 times 12).

(4) *Allocation of fixed rent within a period.* A rental agreement that allocates fixed rent to any period is treated as allocating fixed rent ratably within that period. Thus, if a rental agreement provides that \$120,000 is allocated to each calendar year in the lease term, \$10,000 of rent is allocated to each calendar month.

(5) *Rental period length.* Except as provided in § 1.467-3(d)(1) (relating to agreements for which constant rental accrual is required), rental periods may be of any length, may vary in length, and may be different as between the lessor and the lessee as long as—

(i) The rental periods are one year or less, cover the entire lease term, and do not overlap;

(ii) Each scheduled payment under the rental agreement (other than a payment scheduled to occur before or after the lease term) occurs within 30 days of the beginning or end of a rental period; and

(iii) In the case of a rental agreement that does not provide a specific allocation of fixed rent, the rental periods selected do not cause the agreement to be treated as a section 467 rental agreement unless all alternative rental period schedules would result in such treatment.

§ 1.467-2 Rent accrual for section 467 rental agreements without adequate interest.

(a) *Section 467 rental agreements for which proportional rental accrual is required.* Under § 1.467-1(d)(2)(ii), the fixed rent for each rental period is the proportional rental amount, computed under paragraph (c) of this section, if—

(1) The section 467 rental agreement is not a disqualified leaseback or long-term agreement under § 1.467-3(b); and

(2) The section 467 rental agreement does not provide adequate interest on fixed rent under paragraph (b) of this section.

(b) *Adequate interest on fixed rent—*
(1) *In general.* A section 467 rental agreement provides adequate interest on fixed rent if, disregarding any contingent rent—

(i) The rental agreement has no deferred or prepaid rent as described in § 1.467-1(c)(3);

(ii) The rental agreement has deferred or prepaid rent, and—

(A) The rental agreement provides interest (the stated rate of interest) on deferred or prepaid fixed rent at a single fixed rate (as defined in § 1.1273-1(c)(1)(iii));

(B) The stated rate of interest on fixed rent is no lower than 110 percent of the applicable Federal rate (as defined in paragraph (e)(3) of this section);

(C) The amount of deferred or prepaid fixed rent on which interest is charged is adjusted at least annually to reflect the amount of deferred or prepaid fixed rent as of a date no earlier than the date of the preceding adjustment and no later than the date of the succeeding adjustment; and

(D) The rental agreement requires interest to be paid or compounded at least annually;

(iii) The rental agreement provides for deferred rent but no prepaid rent, and the sum of the present values (within the meaning of paragraph (d) of this section) of all amounts payable by the lessee as fixed rent (and interest, if any, thereon) is equal to or greater than the sum of the present values of the fixed rent allocated to each rental period; or

(iv) The rental agreement provides for prepaid rent but no deferred rent, and the sum of the present values of all amounts payable by the lessee as fixed rent, plus the sum of the negative present values of all amounts payable by the lessor as interest, if any, on prepaid fixed rent, is equal to or less than the sum of the present values of the fixed rent allocated to each rental period.

(2) *Section 467 rental agreements that provide for a variable rate of interest.*

For purposes of the adequate interest test under paragraph (b)(1) of this section, if a section 467 rental agreement provides for variable interest, the rental agreement is treated as providing for fixed rates of interest on deferred or prepaid fixed rent equal to the fixed rate substitutes (determined in the same manner as under § 1.1275-5(e), treating the agreement date as the issue date) for the variable rates called for by the rental agreement. For purposes of this section, a rental agreement provides for variable interest if all stated interest provided by the agreement is paid or compounded at least annually at a rate or rates that meet the requirements of § 1.1275-5(a)(3)(i)(A) or (B) and (a)(4).

(c) *Computation of proportional rental amount—*(1) *In general.* The proportional rental amount for a rental period is the amount of fixed rent allocated to the rental period under § 1.467-1(c)(2)(ii), multiplied by a fraction. The numerator of the fraction is the sum of the present values of the amounts payable under the terms of the section 467 rental agreement as fixed rent and interest thereon. The denominator of the fraction is the sum of the present values of the fixed rent allocated to each rental period under the rental agreement.

(2) *Section 467 rental agreements that provide for a variable rate of interest.* To calculate the proportional rental amount for a section 467 rental agreement that provides for a variable rate of interest, see § 1.467-5.

(d) *Present value.* For purposes of determining adequate interest under paragraph (b) of this section or the proportional rental amount under paragraph (c) of this section, the present value of any amount is determined using a discount rate equal to 110 percent of the applicable Federal rate. In general, present values are determined as of the first day of the first rental period in the lease term. However, if a section 467 rental agreement calls for payments of fixed rent prior to the lease term, present values are determined as of the first day a fixed rent payment is called for by the agreement. For purposes of the present value determination under paragraph (b)(1)(iv) of this section, the fixed rent allocated to a rental period must be discounted from the first day of the rental period. For other conventions and rules relating to the determination of present value, see § 1.467-1(g) and (j).

(e) *Applicable Federal rate—*(1) *In general.* The applicable Federal rate for a section 467 rental agreement is the applicable Federal rate in effect on the agreement date. The *applicable Federal rate* for a rental agreement means—

(i) The Federal short-term rate if the term of the rental agreement is not over 3 years;

(ii) The Federal mid-term rate if the term of the rental agreement is over 3 years but not over 9 years; and

(iii) The Federal long-term rate if the term of the rental agreement is over 9 years.

(2) *Source of applicable Federal rates.* The Internal Revenue Service publishes the applicable Federal rates, based on annual, semiannual, quarterly, and monthly compounding, each month in the Internal Revenue Bulletin (see § 601.601(d) of this chapter). However, the applicable Federal rates may be based on any compounding assumption. To convert a rate based on one compounding assumption to an equivalent rate based on a different compounding assumption, see § 1.1272-1(j), *Example 1*.

(3) *110 percent of applicable Federal rate.* For purposes of § 1.467-1, this section and §§ 1.467-3 through 1.467-9, 110 percent of the applicable Federal rate means 110 percent of the applicable Federal rate based on semiannual compounding or any rate based on a different compounding assumption that is equivalent to 110 percent of the applicable Federal rate based on

semiannual compounding. The Internal Revenue Service publishes 110 percent of the applicable Federal rates, based on annual, semiannual, quarterly, and monthly compounding, each month in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(4) *Term of the section 467 rental agreement*—(i) *In general.* For purposes of determining the applicable Federal rate under this paragraph (e), the term of the section 467 rental agreement includes the lease term, any period before the lease term beginning with the first day an amount of fixed rent is payable under the terms of the rental agreement, and any period after the lease term ending with the last day an amount of fixed rent or interest thereon is payable under the rental agreement.

(ii) *Section 467 rental agreements with variable interest.* If a section 467 rental agreement provides variable interest on deferred or prepaid fixed rent, the term of the rental agreement for purposes of calculating the applicable Federal rate is the longest period between interest rate adjustment dates, or, if the rental agreement provides an initial fixed rate of interest on deferred or prepaid fixed rent, the period between the agreement date and the last day the fixed rate applies, if this period is longer. If, as described in § 1.1274-4(c)(2)(ii), the rental agreement provides for a qualified floating rate (as defined in § 1.1275-5(b)) that in substance resembles a fixed rate, the applicable Federal rate is determined by reference to the lease term.

(f) *Examples.* The following examples illustrate the application of this section. In each of these examples it is assumed that the rental agreement is not a disqualified leaseback or long-term agreement subject to constant rental accrual. The examples are as follows:

Example 1. (i) C agrees to lease property from D for five years beginning on January 1, 2000, and ending on December 31, 2004. The section 467 rental agreement provides that

rent of \$100,000 accrues in each calendar year in the lease term and that rent of \$500,000 plus \$120,000 of interest is payable on December 31, 2004. Assume that the parties select the calendar year as the rental period and that 110 percent of the applicable Federal rate is 10 percent, compounded annually.

(ii) The rental agreement has deferred rent under § 1.467-1(c)(3)(i) because the fixed rent allocated to calendar years 2000, 2001, and 2002 is not paid until 2004. In addition, because the rental agreement does not state an interest rate, the rental agreement does not satisfy the requirements of paragraph (b)(1)(ii) of this section.

(iii)(A) Because the rental agreement has deferred fixed rent and no prepaid rent, the agreement has adequate interest only if the present value test provided in paragraph (b)(1)(iii) of this section is met. The present value of all fixed rent and interest payable under the rental agreement is \$384,971.22, determined as follows: $\$620,000 / (1.10)^5 = \$384,971.22$. The present value of all fixed rent allocated under the rental agreement (discounting the amount of fixed rent allocated to a rental period from the last day of the rental period) is \$379,078.68, determined as follows:

$$\$379,078.68 = \$100,000 \times \frac{1 - (1.10)^{-5}}{.10}$$

(B) The rental agreement provides adequate interest on fixed rent because the present value of the single amount payable under the section 467 rental agreement exceeds the sum of the present values of fixed rent allocated.

(iv) For an example illustrating the computation of the yield on the rental agreement and the allocation of the interest and rent provided for under the rental agreement, see § 1.467-4(f), *Example 2*.

Example 2. (i) E and F enter into a section 467 rental agreement for the lease of equipment beginning on January 1, 2000, and ending on December 31, 2004. The rental agreement provides that rent of \$100,000 accrues for each calendar month during the lease term. All rent is payable on December 31, 2004, together with interest on accrued rent at a qualified floating rate set at a current value (as defined in § 1.1275-5(a)(4)) that is compounded at the end of each calendar month and adjusted at the beginning of each calendar month throughout the lease term.

$$\$2,526,272.20 = \frac{\$800,000}{(1+.085)} + \frac{\$1,000,000}{(1+.085)^2} + \frac{\$1,200,000}{(1+.085)^3}$$

(C) Thus, the fraction for determining the proportional rental amount is .9297194 ($\$2,348,724.30 / \$2,526,272.20$). The section 467 interest for each of the taxable years within the lease term is computed and taken into account as provided in § 1.467-4. The section 467 rent for each of the taxable years within the lease term is as follows:

Taxable year	Section 467 rent
2000	\$743,775.52 (\$ 800,000 × .9297194).
2001	929,719.40 (\$1,000,000 × .9297194).
2002	1,115,663.28 (\$1,200,000 × .9297194).

Therefore, the rental agreement provides for variable interest within the meaning of paragraph (b)(2) of this section.

(ii) On the agreement date the qualified floating rate is 7.5 percent, and 110 percent of the applicable Federal rate, as defined in paragraph (e)(3) of this section, based on monthly compounding, is 7 percent. Under paragraph (b)(2) of this section, the fixed rate substitute for the qualified floating rate is 7.5 percent and the agreement is treated as providing for interest at this fixed rate for purposes of determining whether adequate interest is provided under paragraph (b) of this section. Accordingly, the requirements of paragraph (b)(1)(ii) of this section are satisfied, and the rental agreement has adequate interest.

Example 3. (i) X and Y enter into a section 467 rental agreement for the lease of real property beginning on January 1, 2000, and ending on December 31, 2002. The rental agreement provides that rent of \$800,000 is allocable to 2000, \$1,000,000 is allocable to 2001, and \$1,200,000 is allocable to 2002. Under the rental agreement, Y must make a \$3,000,000 payment on December 31, 2002. Assume that both X and Y choose the calendar year as the rental period, X and Y are calendar year taxpayers, and 110 percent of the applicable Federal rate is 8.5 percent compounded annually.

(ii) The rental agreement fails to provide adequate interest under paragraph (b)(1) of this section. Therefore, under § 1.467-1(d)(2)(ii), the fixed rent for each rental period is the proportional rental amount.

(iii)(A) The proportional rental amount is computed under paragraph (c) of this section. Because the rental agreement does not call for any fixed rent payments prior to the lease term, under paragraph (d) of this section, the present value is determined as of the first day of the first rental period in the lease term. The present value of the single amount payable by the lessee under the rental agreement is computed as follows:

$$\$2,348,724.30 = \frac{\$3,000,000}{(1+.085)^3}$$

(B) The sum of the present values of the fixed rent allocated to each rental period (discounting the fixed rent allocated to a rental period from the last day of such rental period) is computed as follows:

§ 1.467-3 Disqualified leasebacks and long-term agreements.

(a) *General rule.* Under § 1.467-1(d)(2)(i), constant rental accrual (as described under paragraph (d) of this section) must be used to determine the fixed rent for each rental period in the lease term if the section 467 rental agreement is a disqualified leaseback or long-term agreement within the meaning of paragraph (b) of this section.

Constant rental accrual may not be used in the absence of a determination by the Commissioner, pursuant to paragraph (b)(1)(ii) of this section, that the rental agreement is disqualified. Such determination may be made either on a case-by-case basis or in regulations or other guidance published by the Commissioner (see § 601.601(d)(2) of this chapter) providing that a certain type or class of leaseback or long-term agreement will be treated as disqualified and subject to constant rental accrual.

(b) *Disqualified leaseback or long-term agreement*—(1) *In general.* A leaseback (as defined in paragraph (b)(2) of this section) or a long-term agreement (as defined in paragraph (b)(3) of this section) is disqualified only if—

(i) A principal purpose for providing increasing or decreasing rent is the avoidance of Federal income tax (as described in paragraph (c) of this section);

(ii) The Commissioner determines that, because of the tax avoidance purpose, the agreement should be treated as a disqualified leaseback or long-term agreement; and

(iii) The amount determined with respect to the section 467 rental agreement under § 1.467-1(c)(4) (relating to the exception for rental agreements involving total payments of \$250,000 or less) exceeds \$2,000,000.

(2) *Leaseback.* A section 467 rental agreement is a leaseback if the lessee (or a related person) had any interest (other than a de minimis interest) in the property at any time during the two-year period ending on the agreement date. For this purpose, interests in property include options and agreements to purchase the property (whether or not the lessee or related person was considered the owner of the property for Federal income tax purposes) and, in the case of subleased property, any interest as a sublessor.

(3) *Long-term agreement*—(i) *In general.* A section 467 rental agreement is a long-term agreement if the lease term exceeds 75 percent of the property's statutory recovery period.

(ii) *Statutory recovery period*—(A) *In general.* The term statutory recovery period means—

(1) In the case of property depreciable under section 168, the applicable period determined under section 467(e)(3)(A);

(2) In the case of land, 19 years; and

(3) In the case of any other tangible property, the period that would apply under section 467(e)(3)(A) if the property were property to which section 168 applied.

(B) *Special rule for rental agreements relating to properties having different statutory recovery periods.* In the case of

a rental agreement relating to two or more related properties that have different statutory recovery periods, the statutory recovery period for purposes of paragraph (b)(3)(ii)(A) of this section is the weighted average, based on the fair market values of the properties on the agreement date, of the statutory recovery periods of each of the properties.

(c) *Tax avoidance as principal purpose for increasing or decreasing rent*—(1) *In general.* In determining whether a principal purpose for providing increasing or decreasing rent is the avoidance of Federal income tax, all relevant facts and circumstances are taken into account. However, an agreement will not be treated as a disqualified leaseback or long-term agreement if either of the safe harbors set forth in paragraph (c)(3) of this section is met. The mere failure of a leaseback or long-term agreement to meet one of these safe harbors will not, by itself, cause the agreement to be treated as one in which tax avoidance was a principal purpose for providing increasing or decreasing rent.

(2) *Tax avoidance*—(i) *In general.* If, as of the agreement date, a significant difference between the marginal tax rates of the lessor and lessee can reasonably be expected at some time during the lease term, the agreement will be closely scrutinized and clear and convincing evidence will be required to establish that tax avoidance is not a principal purpose for providing increasing or decreasing rent. The term "marginal tax rate" means the percentage determined by dividing one dollar into the amount of the increase or decrease in the Federal income tax liability of the taxpayer that would result from an additional dollar of rental income or deduction.

(ii) *Significant difference in tax rates.* A significant difference between the marginal tax rates of the lessor and lessee is reasonably expected if—

(A) The rental agreement has increasing rents and the lessor's marginal tax rate is reasonably expected to exceed the lessee's marginal tax rate by more than 10 percentage points during any rental period to which the rental agreement allocates annualized fixed rent that is less than the average rent allocated to all calendar years (determined by taking into account the rules set forth in paragraph (c)(4)(iii) of this section); or

(B) The rental agreement has decreasing rents and the lessee's marginal tax rate is reasonably expected to exceed the lessor's marginal tax rate by more than 10 percentage points during any rental period to which the

rental agreement allocates annualized fixed rent that is greater than the average rent allocated to all calendar years (determined by taking into account the rules set forth in paragraph (c)(4)(iii) of this section).

(iii) *Special circumstances.* In determining the expected marginal tax rates of the lessor and lessee, net operating loss and credit carryovers and any other attributes or special circumstances reasonably expected to affect the Federal income tax liability of the taxpayer (including the alternative minimum tax) are taken into account. For example, in the case of a partnership or S corporation, the amount of rental income or deduction that would be allocable to the partners or shareholders, respectively, is taken into account.

(3) *Safe harbors.* Tax avoidance will not be considered a principal purpose for providing increasing or decreasing rent if—

(i) The uneven rent test (as defined in paragraph (c)(4) of this section) is met; or

(ii) The increase or decrease in rent is wholly attributable to one or more of the following provisions—

(A) A contingent rent provision set forth in § 1.467-1(c)(2)(iii)(B); or

(B) A single rent holiday provision allowing reduced rent (or no rent) for one consecutive period during the lease term, but only if—

(1) The rent holiday is for a period of three months or less at the beginning of the lease term and for no other period; or

(2) The duration of the rent holiday is reasonable, determined by reference to commercial practice (as of the agreement date) in the locality where the use of the property occurs, and does not exceed the lesser of 24 months or 10 percent of the lease term.

(4) *Uneven rent test*—(i) *In general.* The uneven rent test is met if the rent allocated to each calendar year does not vary from the average rent allocated to all calendar years (determined in accordance with the rules set forth in paragraph (c)(4)(iii) of this section) by more than 10 percent.

(ii) *Special rule for real estate.* Paragraph (c)(4)(i) of this section is applied by substituting "15 percent" for "10 percent" if the rental agreement is a long-term agreement and at least 90 percent of the property subject to the agreement (determined on the basis of fair market value as of the agreement date) consists of real property (as defined in § 1.856-3(d)).

(iii) *Operating rules.* In determining whether the uneven rent test has been met, the following rules apply:

(A) Any contingent rent attributable to a provision set forth in § 1.467-1(c)(2)(iii)(B)(3) through (9) is disregarded.

(B) If the lease term includes one or more partial calendar years (a period less than a complete calendar year), the average rent allocated to each calendar year is the total rent allocated under the rental agreement, divided by the actual length (in years) of the lease term. The rent allocated to a partial calendar year is annualized by multiplying the allocated rent by the number of periods of the partial calendar year's length in a full calendar year and the annualized rent is treated as the amount of rent allocated to that year in determining whether the uneven rent test is met.

(C) In the case of a rental agreement not described in paragraph (c)(4)(ii) of this section, an initial rent holiday period and any rent allocated to such period are disregarded for purposes of this paragraph (c)(4) if taking such period and rent into account would cause the agreement to fail to meet the uneven rent test. For purposes of this paragraph (c)(4), an initial rent holiday period is any period of three months or less at the beginning of the lease term during which annualized fixed rent (determined by treating such period as a rental period for purposes of § 1.467-1(j)(3)) is less than the average rent allocated to all calendar years (determined before the application of this paragraph (c)(4)(iii)(C)).

(D) In the case of a rental agreement described in paragraph (c)(4)(ii) of this section, one qualified rent holiday period and any rent allocated to such period are disregarded for purposes of this paragraph (c)(4) if taking such period and rent into account would cause the agreement to fail the uneven rent test. For this purpose, a qualified rent holiday period is a consecutive period that is an initial rent holiday period or that meets the following conditions:

(1) The period does not exceed the lesser of 24 months or 10 percent of the lease term (determined before the application of this paragraph (c)(4)(iii)(D)).

(2) Annualized fixed rent during the period (determined by treating the period as a rental period for purposes of § 1.467-1(j)(3)) is less than the average rent allocated to all calendar years (determined before the application of this paragraph (c)(4)(iii)(D)).

(3) Providing less than average rent for the period is reasonable, determined by reference to commercial practice (as of the agreement date) in the locality where the use of the property occurs.

(E) If the rental agreement contains a variable interest rate provision, the uneven rent test is applied by treating the rent as having been fixed under the terms of the rental agreement for the entire lease term using fixed rate substitutes (determined in the same manner as § 1.1275-5(e), treating the agreement date as the issue date) for the variable rates of interest provided under the terms of the lessor's indebtedness.

(d) *Calculating constant rental amount*—(1) *In general.* Except as provided in paragraph (d)(2) of this section, the constant rental amount is the amount that, if paid at the end of each rental period, would result in a present value equal to the present value of all amounts payable under the disqualified leaseback or long-term agreement as rent and interest. In computing the constant rental amount, the rules for determining present value are the same as those provided in § 1.467-2(d) for computing the proportional rental amount. If constant rental accrual is required, all rental periods (other than an initial or final short period of not more than one month) must be equal in length and satisfy the requirements of § 1.467-1(j)(5).

(2) *Initial or final short periods.* If a disqualified leaseback or long-term agreement has an initial or final short rental period, the constant rental amount for the initial or final short period may be determined under any reasonable method. However, the sum of the present values of all the constant rental amounts must equal the present values of all amounts payable under the disqualified leaseback or long-term agreement as rent and interest. Any adjustment necessary to eliminate the section 467 loan balance because of the method used to determine the constant rental amount for short periods must be taken into account as section 467 rent for the final rental period.

(3) *Method to determine constant rental amount; no short periods*—(i) *Step 1.* Determine the present value of amounts payable under the disqualified leaseback or long-term agreement as rent or interest.

(ii) *Step 2.* Determine the present value of \$1 to be received at the end of each rental period during the lease term as of the first day of the first rental period during the lease term (or, if earlier, the first day a rent payment is required under the rental agreement).

(iii) *Step 3.* Divide the amount determined in paragraph (d)(3)(i) of this section (Step 1) by the number of dollars determined in paragraph (d)(3)(ii) of this section (Step 2).

(e) *Examples.* The following examples illustrate the application of this section:

Example 1. (i) K, lessor, and L, lessee, enter into a long-term agreement for a 10-year lease of personal property beginning on January 1, 2000. K and L are C corporations that use the calendar year as their taxable year. K does not have any unused losses or credits from taxable years preceding 2000. In addition, as of the agreement date, K expects that it will be subject to the maximum rate of tax imposed by section 11 in 2000 and that it will not be limited in its ability to use any losses or credits. As of the agreement date, L expects that it will be subject to the alternative minimum tax imposed by section 55 in 2000. The rental agreement provides for rent allocations in each year of the lease term, as follows:

Year	Amount
2000	\$427,500
2001	442,500
2002	457,500
2003	472,500
2004	487,500
2005	502,500
2006	517,500
2007	532,500
2008	547,500
2009	562,500

(ii) As described in paragraph (c)(2) of this section, as of the agreement date, a significant difference between the marginal tax rates of the lessor and lessee can reasonably be expected at some time during the lease term. First, the rental agreement has increasing rents. Second, the lessor's marginal tax rate exceeds the lessee's marginal tax rate by more than 10 percentage points during a rental period to which the rental agreement allocates less than a ratable portion of the aggregate amount of rent payable under the agreement. For example, for the year 2000, the lessor's expected marginal tax rate is 35 percent, the percentage determined by dividing the increase in the Federal income tax liability of K that would result from an additional dollar of rental income (\$.35) by \$1. Because the lessee is subject to the alternative minimum tax, the lessee's expected marginal tax rate for 2000 is 20 percent, the percentage determined by dividing the decrease in the Federal income tax liability (taking into account both the decrease in the lessee's regular tax and the increase in the lessee's alternative minimum tax) that would result from an additional dollar of rental deduction (\$.20) by \$1. Further, for the year 2000, the rent allocated in accordance with the rental agreement is \$427,500, which is less than a ratable portion of the aggregate amount of rental payments, \$495,000, determined by dividing the total rents payable under the agreement (\$4,950,000) by the number of years in the lease term (10). Thus, because a significant difference between the marginal tax rates of the lessor and lessee can reasonably be expected during the lease term, the agreement will be closely scrutinized and clear and convincing evidence will be required to establish that tax avoidance is not

a principal purpose for providing increasing rent.

Example 2. (i) A and B enter into a long-term agreement for a 5-year lease of personal property beginning on July 1, 2000, and ending on June 30, 2005. The rental agreement provides that the rent is allocated to the calendar years in the lease term in accordance with the following schedule and is paid at successive six-month intervals (on December 31 and June 30) during the lease term:

Year	Amount
2000	\$450,000
2001	900,000
2002	900,000
2003	1,100,000
2004	1,100,000
2005	550,000

(ii) In determining whether the uneven rent test described in paragraph (c)(4)(i) of this section is met, the total amount of rent allocated under the rental agreement is \$5,000,000, and the lease term is five years. The average rent for each year is \$1,000,000 (see paragraph (c)(4)(iii)(B) of this section), and the uneven rent test is met if the rent for each year is not less than \$900,000 and not more than \$1,100,000. The test is met for 2000 because the annualized rent for that year is \$900,000. The test is met for 2005 because the annualized rent for that year is \$1,100,000. The test is met for each of the years 2001 through 2004 because the rent for each of these years is not less than \$900,000 and not more than \$1,100,000. Accordingly, because the uneven rent test of paragraph (c)(4)(i) of this section is met, the long-term agreement will not be treated as disqualified.

Example 3. (i) C and D enter into a long-term agreement for a lease of personal property beginning on October 1, 1999, and ending on December 31, 2005. The rental agreement provides that the rent is allocated to the calendar years in the lease term in accordance with the following schedule and is paid at successive six-month intervals (on December 31 and June 30) during the lease term:

Year	Amount
1999	\$0
2000	900,000
2001	900,000
2002	900,000
2003	1,100,000
2004	1,100,000
2005	1,100,000

(ii) The three-month rent holiday period at the beginning of the lease term is an initial rent holiday within the meaning of paragraph (c)(4)(iii)(C) of this section. Moreover, the agreement would fail the uneven rent test if the rent holiday period and the rent allocated to the period were taken into account. Thus, under paragraph (c)(4)(iii)(C) of this section, the period and the rent allocated to the period are disregarded for purposes of applying the uneven rent test. In that case, the lease term is six years, and the uneven rent test is met because the average rent for

each year in the lease term is \$1,000,000 and the rent for each calendar year in the lease term is not less than \$900,000 nor more than \$1,100,000. Accordingly, the long-term agreement will not be treated as disqualified.

Example 4. (i) E and F enter into a long-term agreement for a 6-year lease of personal property beginning on January 1, 2000, and ending on December 31, 2005. The rental agreement provides that the rent allocated to the calendar years in the lease term and paid at successive six-month intervals (on June 30 and December 31) during the lease term is the sum of the interest on the lessor's indebtedness, in the amount of \$4,637,577, and an amount determined in accordance with the following schedule:

Year	Amount
2000	\$539,574
2001	583,603
2002	631,225
2003	886,733
2004	959,090
2005	1,037,352

(ii) Assume further that the lessor's indebtedness bears interest at the rate of 2 percent in excess of the 6-month London Interbank Offered Rate (LIBOR) in effect on the first day of the 6-month period for each rental period and that, on the agreement date, the interest rate under this formula would be 8 percent. If the interest rate remained fixed during the entire lease term, the formula for determining the rent payable by the lessee would result in payments of rent in the amount of \$450,000 for each six-month period in 2000, 2001, and 2002, and \$550,000 for each six-month period in 2003, 2004, and 2005.

(iii) Under paragraph (c)(4)(iii)(E) of this section, the fixed rate substitute for the variable interest rate provision produces a schedule of fixed rents that meets the uneven rent test of paragraph (c)(4)(i) of this section. Thus, even if the actual rents payable under the rental agreement do not meet the uneven rent test because of fluctuations in the 6-month LIBOR, the uneven rent test will be treated as having been met, and the long-term agreement will not be treated as disqualified.

Example 5. (i) G and H enter into a long-term agreement for a 5-year lease of personal property beginning on January 1, 2000, and ending on December 31, 2004. The rental agreement provides that the rent is payable to G at the rate of \$40,000 per month in arrears, subject to an adjustment based on changes in prevailing interest rates during the lease term. Under this adjustment, the lessor is entitled to receive an amount equal to the sum of a specified dollar amount, which increases each month as payments of rent are made, and interest on a notional principal amount (as defined in § 1.446-3(c)(3)) at a qualified floating rate (as defined in § 1.1275-5(b)). The notional principal amount is initially established at 80 percent of the cost of the property. As each payment of rent is made, the notional principal amount is reduced (but not below zero) to an amount that would represent the outstanding principal balance of a loan the payments on which are equal to the monthly payments of

rent. As of the agreement date, the value of the qualified floating rate is 9 percent. Although G did not incur indebtedness specifically for the purpose of acquiring the property, the parties agreed to the adjustment provisions in order to compensate G for its general costs of borrowing.

(ii) The adjustment provision produces a schedule of rent payments that is virtually identical to the schedule that would have resulted if G had actually borrowed money in an amount and on terms identical to the terms used in determining interest on the notional principal amount and the adjustment were based on that indebtedness. An adjustment based on actual indebtedness of the lessor would have been a variable interest rate provision eligible for a safe harbor under paragraph (c)(3)(ii)(A) of this section. Accordingly, based on all the facts and circumstances, the adjustment provision did not have as one of its principal purposes the avoidance of Federal income tax, and thus the long-term agreement will not be treated as disqualified.

Example 6. (i) X and Y enter into a leaseback for a 5-year lease of personal property beginning on January 1, 1998, and ending on December 31, 2002. The rental agreement provides that \$0 of rent is allocated to years 1998, 1999, and 2000, and that rent of \$17,500,000 is allocated to years 2001 and 2002. The rental agreement provides that the rent allocated to each year is payable on December 31 of that year. Assume all rental periods are the calendar year. Assume also that 110 percent of the applicable Federal rate based on annual compounding is 12 percent.

(ii)(A) If the Commissioner determines that the leaseback is disqualified, the constant rental amount is computed as follows:

(B) Step 1 in calculating the constant rental amount is to determine the present value of the two payments due under the rental agreement as follows:

$$\$21,051,536 = \frac{\$17,500,000}{(1.12)^4} + \frac{\$17,500,000}{(1.12)^5}$$

(iii) Because no amounts of rent are payable before the lease term, Step 2 in calculating the constant rental amount is to determine the present value as of the first day of the lease term of \$1 to be received at the end of each rental period during the lease term. This results in a present value of \$3.6047762. In Step 3 the amount determined in Step 1 is divided by the number of dollars determined in Step 2. Thus, the constant rental amount is \$5,839,901 for each calendar year during the lease term computed as follows:

$$\$5,839,901 = \frac{\$21,051,536}{3.6047762}$$

§ 1.467-4 Section 467 loan.

(a) *In general*—(1) *Overview.* Except as provided in paragraph (a)(2) of this section, the section 467 loan rules of this section apply to a section 467 rental agreement if, as of the first day of a rental period, there is a difference between the amount of fixed rent

payable under the rental agreement on or before the first day and the amount of fixed rent required to be accrued in accordance with § 1.467-1(d)(2) before the first day. Paragraph (b) of this section provides rules for computing the principal balance of a section 467 loan at the beginning of any rental period. The principal balance of a section 467 loan may be positive or negative. For Federal tax purposes, if the principal balance is positive, the amount represents a loan from the lessor to the lessee, and if the principal balance is negative, the amount represents a loan from the lessee to the lessor.

(2) *No section 467 loan in the case of certain section 467 rental agreements.* Except as provided in paragraphs (a)(3) and (4) of this section, this section does not apply to section 467 rental agreements that provide adequate interest under § 1.467-2(b)(1)(i) (agreements with no deferred or prepaid rent) or § 1.467-2(b)(1)(ii) (agreements with deferred or prepaid rent that provide adequate stated interest at a single fixed rate).

(3) *Rental agreements subject to constant rental accrual.* Notwithstanding the provisions of paragraph (a)(2) of this section, this section applies to rental agreements subject to constant rental accrual under § 1.467-3 (relating to disqualified leasebacks or long-term agreements).

(4) *Special rule in applying the provisions of § 1.467-7(e), (f), or (g).* Notwithstanding the provisions of paragraph (a)(2) of this section, section 467 loan balances must be computed for section 467 rental agreements that are not subject to constant rental accrual under § 1.467-3 and that provide adequate interest under § 1.467-2(b)(1)(i) or (ii), but only for purposes of applying the provisions of § 1.467-7(e) (relating to dispositions of property subject to a section 467 rental agreement), § 1.467-7(f) (relating to assignments by lessees and lessee-financed renewals), and § 1.467-7(g) (relating to modifications of rental agreements).

(b) *Principal balance—(1) In general.* Except as provided in paragraph (b)(2) of this section or in § 1.467-7(e), (f), or (g), the principal balance of the section 467 loan at the beginning of a rental period equals—

(i) The fixed rent accrued in preceding rental periods;

(ii) Increased by the sum of—

(A) The interest on fixed rent includible in the gross income of the lessor for preceding rental periods; and

(B) Any amount payable by the lessor on or before the first day of the rental

period as interest on prepaid fixed rent; and

(iii) Decreased by the sum of—

(A) The interest on prepaid fixed rent includible in the gross income of the lessee for preceding rental periods; and

(B) Any amount payable by the lessee on or before the first day of the rental period as fixed rent or interest thereon.

(2) *Section 467 rental agreements that provide for prepaid fixed rent and adequate interest.* If a section 467 rental agreement calls for prepaid fixed rent and provides adequate interest under § 1.467-2(b)(1)(iv), the principal balance of the section 467 loan at the beginning of a rental period equals the principal balance determined under paragraph (b)(1) of this section, plus the fixed rent accrued for that rental period.

(3) *Timing of payments.* For purposes of this paragraph (b), the day on which an amount is payable is determined under the rules of § 1.467-1(j)(2)(i)(B) through (E) and § 1.467-1(j)(2)(ii).

(c) *Yield—(1) In general—(i) Method of determining yield.* Except as provided in paragraphs (c)(2) and (3) of this section, the yield of a section 467 loan is the discount rate at which the sum of the present values of all amounts payable by the lessee as fixed rent and interest on fixed rent, plus the sum of the present values of all amounts payable by the lessor as interest on prepaid fixed rent, equals the sum of the present values of the fixed rent that accrues in accordance with § 1.467-1(d)(2). The yield must be constant over the term of the section 467 rental agreement and, when expressed as a percentage, must be calculated to at least two decimal places.

(ii) *Method of stating yield.* In determining the section 467 interest for a rental period, the yield of the section 467 loan must be stated appropriately by taking into account the length of the rental period. Section 1.1272-1(j), *Example 1*, provides a formula for converting a yield based on a period of one length to an equivalent yield based on a period of a different length.

(iii) *Rounding adjustments.* Any adjustment necessary to eliminate the section 467 loan because of rounding the yield to two or more decimal places must be taken into account as an adjustment to the section 467 interest for the final rental period determined as provided in paragraph (e) of this section.

(2) *Yield of section 467 rental agreements for which constant rental amount or proportional rental amount is computed.* In the case of a section 467 rental agreement to which § 1.467-1(d)(2)(i) or (ii) applies, the yield of the section 467 loan equals 110 percent of

the applicable Federal rate (based on a compounding period equal to the length of the rental period).

(3) *Yield for purposes of applying paragraph (a)(4) of this section.* For purposes of applying paragraph (a)(4) of this section, the yield of the section 467 loan balance of any party, or prior party, to a section 467 rental agreement for a period is the same for all parties and is the yield that results in the net accrual of positive or negative interest for that period equal to the amount of such interest that accrues under the terms of the rental agreement for that period. For example, if property subject to a section 467 rental agreement is sold (transferred) and the beginning section 467 loan balance of the transferor (as described in § 1.467-7(e)(2)(i)) is positive and the beginning section 467 loan balance of the transferee (as described in § 1.467-7(e)(2)(ii)) is negative, the yield on each of these loan balances for any period is the same for all parties and is the yield that results in the net accrual of positive or negative interest, taking into account the aggregate positive or negative interest on the section 467 loan balances of both the transferor and transferee, equal to the amount of such interest that accrues under the terms of the rental agreement for that period.

(4) *Determination of present values.* The rules for determining present value in computing the yield of a section 467 loan are the same as those provided in § 1.467-2(d) for computing the proportional rental amount.

(d) *Contingent payments.* Except as otherwise required, contingent payments are not taken into account in calculating either the yield or the principal balance of a section 467 loan.

(e) *Section 467 rental agreements that call for payments before or after the lease term.* If a section 467 rental agreement calls for the payment of fixed rent or interest thereon before the beginning of the lease term, this section is applied by treating the period beginning on the first day an amount is payable and ending on the day before the beginning of the first rental period of the lease term as one or more rental periods. If a rental agreement calls for the payment of fixed rent or interest thereon after the end of the lease term, this section is applied by treating the period beginning on the day after the end of the last rental period of the lease term and ending on the last day an amount of fixed rent or interest thereon is payable as one or more rental periods. Rental period length for the period before the lease term or after the lease term is determined in accordance with the rules of § 1.467-1(j)(5).

(f) *Examples.* The following examples illustrate the application of this section:

Example 1. (i)(A) A leases property to B for a three-year period beginning on January 1, 2000, and ending on December 31, 2002. The section 467 rental agreement has the following rent allocation schedule and payment schedule:

	Rent allocation	Payment
2000	\$400,000	.....
2001	600,000	.....
2002	800,000	\$1,800,000

(B) The rental agreement requires a \$1.8 million payment to be made on December 31, 2002, but does not provide for interest on deferred rent. Assume A and B choose the calendar year as the rental period length and that 110 percent of the applicable Federal rate based on annual compounding is 10 percent. Assume also that the agreement is not a leaseback or long-term agreement and, therefore, is not subject to constant rental accrual.

(ii) Because the section 467 rental agreement does not provide adequate interest under § 1.467-2(b) and is not subject to constant rental accrual, the fixed rent that accrues during each rental period is the proportional rental amount as described in § 1.467-2(c). The proportional rental amounts for each rental period are as follows:

Calendar year	Section 467 interest	Section 467 rent	Section 467 loan balance
2000	\$0	\$100,000.00	\$100,000.00
2001	10,775.08	100,000.00	210,775.08
2002	22,711.18	100,000.00	333,486.26
2003	35,933.41	100,000.00	469,419.67
2004	50,580.33	100,000.00	620,000.00

(B) C takes the amounts of interest and rent into account as expense and D takes such amounts into account as income for the calendar years identified above, regardless of their respective overall methods of accounting.

§ 1.467-5 Section 467 rental agreements with variable interest.

(a) *Variable interest on deferred or prepaid rent—(1) In general.* This section provides rules for computing section 467 rent and interest in the case of section 467 rental agreements providing variable interest. For purposes of this section, a rental agreement provides for variable interest if the rental agreement provides for stated interest that is paid or compounded at least annually at a rate or rates that meet the requirements of § 1.1275-5(a)(3)(i)(A) or (B) and (a)(4). If a section 467 rental agreement provides for interest that is neither variable interest nor fixed interest, the agreement provides for contingent payments.

2001	555,555.56
2002	740,740.73

(iii) A section 467 loan arises at the beginning of the second rental period because the rent payable on or before that day (zero) is less than the fixed rent accrued under § 1.467-1(d)(2) in all preceding rental periods (\$370,370.37). Under paragraph (c)(2) of this section, the yield of the loan is equal to 110 percent of the applicable Federal rate (10 percent compounded annually). Because no payments are treated as made on or before the first day of the second rental period, the principal balance of the loan at the beginning of the second rental period is \$370,370.37. The interest for the second rental period on fixed rent is \$37,037.04 (.10 × \$370,370.37) and, under § 1.467-1(e)(3), is treated as interest income of the lessor and as an interest expense of the lessee.

(iv) Because no payments are made on or before the first day of the third rental period, the principal balance of the loan at the beginning of the third rental period is equal to the fixed rent accrued during the first and second rental periods plus the lessor's interest income on fixed rent for the second rental period (\$962,962.97 = \$370,370.37 + \$555,555.56 + \$37,037.04). The interest for the third rental period on fixed rent is \$96,296.30 (.10 × \$962,962.97). Thus, the sum of the fixed rent and interest on fixed rent for the three rental periods is equal to the total amount paid over the lease term (first year fixed rent accrual, \$370,370.37, plus second year fixed rent and interest accrual, \$555,555.56 + \$37,037.04, plus third

year fixed rent and interest accrual, \$740,740.73 + \$96,296.30, equals \$1,800,000). B takes the amounts of interest and rent into account as interest and rent expense, respectively, and A takes such amounts into account as interest and rent income, respectively, for the calendar years identified above, regardless of their respective overall methods of accounting.

Example 2. (i) The facts are the same as in *Example 1*, § 1.467-2(f). C agrees to lease property from D for five years beginning on January 1, 2000, and ending on December 31, 2004. The section 467 rental agreement provides that rent of \$100,000 accrues in each calendar year in the lease term and that rent of \$500,000 plus \$120,000 of interest is payable on December 31, 2004. The parties select the calendar year as the rental period, and 110 percent of the applicable Federal rate is 10 percent, compounded annually. The rental agreement has deferred rent but provides adequate interest on fixed rent.

(ii)(A) Pursuant to paragraph (c)(1) of this section, the yield of the section 467 loan is 10.775078%, compounded annually. The following is a schedule of the rent allocable to each rental period during the lease term, the balance of the section 467 loan as of the end of each rental period (determined, in the case of the calendar year 2004, without regard to the single payment of rent and interest in the amount of \$620,000 payable on the last day of the lease term), and the interest on the section 467 loan allocable to each rental period:

(2) *Exceptions.* This section is not applicable to section 467 rental agreements that provide adequate interest under § 1.467-2(b)(1)(i) (agreements with no deferred or prepaid rent) or (b)(1)(ii) (rental agreements with stated interest at a single fixed rate). The exceptions in this paragraph (a)(2) do not apply to rental agreements subject to constant rental accrual under § 1.467-3.

(b) *Variable rate treated as fixed—(1) In general.* If a section 467 rental agreement provides variable interest—

(i) The fixed rate substitutes (determined in the same manner as under § 1.1275-5(e), treating the agreement date as the issue date) for the variable rates of interest on deferred or prepaid fixed rent provided by the rental agreement must be used in computing the proportional rental amount under § 1.467-2(c), the constant rental amount under § 1.467-3(d), the principal balance of a section 467 loan

under § 1.467-4(b), and the yield of a section 467 loan under § 1.467-4(c); and

(ii) The interest on fixed rent for any rental period is equal to the amount that would be determined under § 1.467-1(e)(2) if the section 467 rental agreement did not provide variable interest, using the fixed rate substitutes determined under paragraph (b)(1)(i) of this section in place of the variable rates called for by the rental agreement, plus the variable interest adjustment amount provided in paragraph (b)(2) of this section.

(2) *Variable interest adjustment amount—(i) In general.* The variable interest adjustment amount for a rental period equals the difference between—

(A) The amount of interest that, without regard to section 467, would have accrued during the rental period under the terms of the section 467 rental agreement; and

(B) The amount of interest that, without regard to section 467, would

have accrued during the rental period under the terms of the section 467 rental agreement using the fixed rate substitutes determined under paragraph (b)(1)(i) of this section in place of the variable interest rates called for by the rental agreement.

(ii) *Positive or negative adjustment.* If the amount determined under paragraph (b)(2)(i)(A) of this section is greater than the amount determined under paragraph (b)(2)(i)(B) of this section, the variable interest adjustment amount is positive. If the amount determined under paragraph (b)(2)(i)(A) of this section is less than the amount determined under paragraph (b)(2)(i)(B) of this section, the variable interest adjustment amount is negative.

(3) *Section 467 loan balance.* The variable interest adjustment amount is not taken into account in determining the principal balance of a section 467 loan under § 1.467-4(b). Instead, the section 467 loan balance is computed as if all amounts payable under the section 467 rental agreement were based on the fixed rate substitutes determined under paragraph (b)(1)(i) of this section.

(c) *Examples.* The following examples illustrate the application of this section:

Example 1. (i) X and Y enter into a section 467 rental agreement for the lease of personal property beginning on January 1, 2000, and ending on December 31, 2002. The rental agreement allocates \$100,000 of rent to 2000, \$200,000 to 2001, and \$100,000 to 2002, and requires the lessee to pay all \$400,000 of rent on December 31, 2002. The rental agreement requires the accrual of interest on unpaid accrued rent at two different qualified floating rates (as defined in § 1.1275-5(b)), one for 2001 and the other for 2002, such interest to be paid on December 31 of the year it accrues. The rental agreement provides that the qualified floating rate is set at a current value within the meaning of § 1.1275-5(a)(4). Assume that on the agreement date, 110 percent of the applicable Federal rate is 10 percent, compounded annually. Assume also that the agreement is not a leaseback or long-term agreement and, therefore, is not subject to constant rental accrual.

(ii) To determine if the section 467 rental agreement provides for adequate interest under § 1.467-2(b), § 1.467-2(b)(2) requires the use of fixed rate substitutes (in this example determined in the same manner as under § 1.1275-5(e)(3)(i) treating the agreement date as the issue date) in place of the variable rates called for by the rental agreement. Assume that on the agreement date the qualified floating rates, and therefore the fixed rate substitutes, relating to 2001 and

2002 are 10 and 15 percent compounded annually. Taking into account the fixed rate substitutes, the sum of the present values of all amounts payable by the lessee as fixed rent and interest thereon is greater than the sum of the present values of the fixed rent allocated to each rental period. Accordingly, the rental agreement provides adequate interest under § 1.467-2(b)(1)(iii) and the fixed rent accruing in each calendar year during the rental agreement is the fixed rent allocated under the rental agreement.

(iii) Because the section 467 rental agreement provides for variable interest on unpaid accrued fixed rent at qualified floating rates and the qualified floating rates are set at a current value, the requirements of § 1.1275-5(a)(3)(i)(A) and (4) are met and the rental agreement provides for variable interest within the meaning of paragraph (a)(1) of this section. Therefore, under paragraph (b)(1)(i) of this section, the yield of the section 467 loan is computed based on the fixed rate substitutes. Under § 1.467-4(c), the constant yield (rounded to two decimal places) equals 13.63 percent compounded annually. Based on the fixed rate substitutes, the fixed rent, interest on fixed rent, and the principal balance of the section 467 loan, for each calendar year during the lease term, are as follows:

	Accrued rent	Accrued interest	Projected payment	Cumulative loan
2000	\$100,000	\$0	\$0	\$100,000
2001	200,000	13,630	(10,000)	303,630
2002	100,000	41,370	(445,000)	0

(iv) To compute the actual reported interest on fixed rent for each calendar year, the variable interest adjustment amount, as described in paragraph (b)(2) of this section, must be added to the accrued interest determined in paragraph (iii) of this *Example 1*. Assume that the variable rates for 2001 and 2002 are actually 11 and 14 percent, respectively. Without regard to section 467, the interest that would have accrued during each calendar year under the terms of the section 467 rental agreement, and the interest that would have accrued under the terms of the rental agreement using the fixed rate substitutes determined under paragraph (b)(1)(i) of this section are as follows:

	Accrued interest under rental agreement	Accrued interest using fixed rate substitutes
2000	\$0	\$0
2001	11,000	10,000
2002	42,000	45,000

(v) Under paragraph (b)(2) of this section, the variable interest adjustment amount is \$1,000 (\$11,000 - \$10,000) for 2001 and is -\$3,000 (\$42,000 - \$45,000) for 2002. Thus, under paragraph (b)(1)(ii) of this section, the actual interest on fixed rent for 2001 is \$14,630 (\$13,630 + \$1,000) and for 2002 is \$38,370 (\$41,370 - \$3,000).

Example 2. (i) The facts are the same as in *Example 1* except that 110 percent of the applicable Federal rate is 15 percent compounded annually and the section 467 rental agreement does not provide adequate interest under § 1.467-2(b). Consequently, the fixed rent for each calendar year during the lease is the proportional rental amount.

(ii) The sum of the present values of the fixed rent provided for each calendar year during the lease term, discounted at 15 percent compounded annually, equals \$303,936.87.

(iii)(A) Paragraph (b)(1)(i) of this section requires the proportional rental amount to be computed based on the assumption that

interest will accrue and be paid based on the fixed rate substitutes. Thus, the sum of the present values of the projected payments under the section 467 rental agreement equals \$300,156.16, computed as follows:

$$\begin{aligned}
 & \$ 10,000 / (1.15)^2 = \$ 7,561.44 \\
 & 445,000 / (1.15)^3 = \underline{292,594.72} \\
 & \qquad \qquad \qquad \underline{\$300,156.16}
 \end{aligned}$$

(B) The fraction for computing the proportional rental amount equals .9875609 (\$300,156.16/\$303,936.87).

(iv) Based on the fixed rate substitutes, the fixed rent, interest on fixed rent, and the balance of the section 467 loan for each calendar year during the lease term are as follows:

	Proportional rent	Accrued interest	Projected payment	Cumulative loan
2000	\$98,756.09	\$0.00	\$0	\$98,756.09
2001	197,512.18	14,813.41	(10,000)	301,081.68
2002	98,756.09	45,162.23	(445,000)	0.00

(v) The variable interest adjustment amount in this example is the same as in *Example 1*. Under paragraph (b)(1)(ii) of this section, the actual interest on fixed rent for 2001 is \$15,813.41 (\$14,813.41 + \$1,000) and for 2002 is \$42,162.23 (\$45,162.23 - \$3,000).

§ 1.467-6 Section 467 rental agreements with contingent payments. [Reserved].

§ 1.467-7 Section 467 recapture and other rules relating to dispositions and modifications.

(a) *Section 467 recapture.*

Notwithstanding any other provision of the Internal Revenue Code, except as provided in paragraph (c) of this section, a lessor disposing of property in a transaction to which this paragraph (a) applies must recognize the recapture amount (determined under paragraph (b) of this section) and treat that amount as ordinary income. This paragraph (a) applies to any disposition of property subject to a section 467 rental agreement that—

(1) Is a leaseback (as defined in § 1.467-3(b)(2)) or a long-term agreement (as defined in § 1.467-3(b)(3));

(2) Is not disqualified under § 1.467-3(b)(1); and

(3) Allocates to any rental period fixed rent that, when annualized, exceeds the annualized fixed rent allocated to any preceding rental period.

(b) *Recapture amount*—(1) *In general.* The recapture amount for a disposition is the lesser of—

(i) The prior understated inclusion (determined under paragraph (b)(2) of this section); or

(ii) The section 467 gain (determined under paragraph (b)(3) of this section).

(2) *Prior understated inclusion.* The prior understated inclusion is the excess (if any) of—

(i) The aggregate amount of section 467 rent and section 467 interest for the period during which the lessor held the property, determined as if the section 467 rental agreement were a disqualified leaseback or long-term agreement subject to constant rental accrual under § 1.467-3; over

(ii) The aggregate amount of section 467 rent and section 467 interest accrued by the lessor during that period.

(3) *Section 467 gain*—(i) *In general.* Except as otherwise provided in paragraph (b)(3)(ii) of this section, the section 467 gain is the excess (if any) of—

(A) The amount realized from the disposition; over

(B) The sum of the adjusted basis of the property and the amount of any gain from the disposition that is treated as ordinary income under any provision of subtitle A of the Internal Revenue Code

other than section 467(c) (for example, section 1245 or 1250).

(ii) *Certain dispositions.* In the case of a disposition that is not a sale or exchange, the section 467 gain is the excess (if any) of the fair market value of the property on the date of disposition over the amount determined under paragraph (b)(3)(i)(B) of this section.

(c) *Special rules*—(1) *Gifts.* Paragraph (a) of this section does not apply to a disposition by gift. However, see paragraph (c)(4) of this section for dispositions by transferees. If a disposition is in part a sale or exchange and in part a gift, paragraph (a) of this section applies to the disposition but the prior understated inclusion is determined by taking into account only section 467 rent and section 467 interest properly allocable to the portion of the property not disposed of by gift.

(2) *Dispositions at death.* Paragraph (a) of this section does not apply to a disposition if the basis of the property in the hands of the transferee is determined under section 1014(a). This paragraph (c)(2) does not apply to property which constitutes a right to receive an item of income in respect of a decedent. See sections 691 and 1014(c).

(3) *Certain tax-free exchanges*—(i) *In general.* The recapture amount in the case of a disposition to which this paragraph (c)(3) applies is limited to the amount of gain recognized to the transferor (determined without regard to paragraph (a) of this section), reduced by the amount of any gain from the disposition that is treated as ordinary income under any provision of subtitle A of the Internal Revenue Code other than section 467(c). However, see paragraph (c)(4) of this section for dispositions by transferees.

(ii) *Dispositions covered*—(A) *In general.* Except as provided in paragraph (c)(3)(ii)(B) of this section, this paragraph (c)(3) applies to a disposition of property if the basis of the property in the hands of the transferee is determined by reference to its basis in the hands of the transferor by reason of the application of section 332, 351, 361, 721, or 731.

(B) *Transfers to certain tax-exempt organizations.* This paragraph (c)(3) does not apply to a disposition to an organization (other than a cooperative described in section 521) which is exempt from tax imposed by chapter 1, subtitle A of the Internal Revenue Code (a tax-exempt entity) except to the extent the property is used in an activity the income from which is subject to tax under section 511(a) (a section 511(a) activity). However, if assets used to any

extent in a section 511(a) activity are disposed of by the tax-exempt entity, then, notwithstanding any other provision of law (except section 1031 or section 1033) the recapture amount with respect to such disposition, to the extent attributable under paragraph (c)(4) of this section to the period of the transferor's ownership of the property prior to the first disposition, shall be included in the tax-exempt entity's unrelated business taxable income. To the extent that the tax-exempt entity ceases to use the property in a section 511(a) activity, the entity will be treated for purposes of this paragraph (c)(3) and paragraph (c)(4) of this section as having disposed of the property to such extent on the date of the cessation.

(4) *Dispositions by transferee.* If the recapture amount with respect to a disposition of property (the first disposition) is limited under paragraph (c)(1) or (3) of this section and the transferee subsequently disposes of the property in a transaction to which paragraph (a) of this section applies, the prior understated inclusion determined under paragraph (b)(2) of this section is computed by taking into account the amounts attributable to the period of the transferor's ownership of the property prior to the first disposition. Thus, for example, the section 467 rent and section 467 interest that would have been taken into account by the transferee if the section 467 rental agreement were a disqualified leaseback or long-term agreement subject to constant rental accrual include the amounts that would have been taken into account by the transferor, and the aggregate amount of section 467 rent and section 467 interest accrued by the transferee includes the aggregate amount of section 467 rent and section 467 interest that was taken into account by the transferor. The prior understated inclusion determined under this paragraph (c)(4) must be reduced by any recapture amount taken into account under paragraph (a) of this section by the transferor.

(5) *Like-kind exchanges and involuntary conversions.* If property is disposed of or converted and, before the application of paragraph (a) of this section, gain is not recognized in whole or in part under section 1031 or 1033, then the amount of section 467 gain taken into account by the lessor is limited to the sum of—

(i) The amount of gain recognized on the disposition or conversion of the property (determined without regard to paragraph (a) of this section); and

(ii) The fair market value of property acquired that is not subject to the same section 467 rental agreement and that is

not taken into account under paragraph (c)(5)(i) of this section.

(6) *Installment sales.* In the case of an installment sale of property to which paragraph (a) of this section applies—

(i) The recapture amount is recognized and treated as ordinary income in the year of the disposition; and

(ii) Any gain in excess of the recapture amount is reported under the installment method of accounting if and to the extent that method is otherwise available under section 453.

(7) *Dispositions covered by section 170(e), 341(e)(12), or 751(c).* For purposes of sections 170(e), 341(e)(12), and 751(c), amounts treated as ordinary income under paragraph (a) of this section must be treated in the same manner as amounts treated as ordinary income under section 1245 or 1250.

(d) *Examples.* The following examples illustrate the application of paragraphs (a), (b), and (c) of this section. In each of these examples the transferor of property subject to a section 467 rental agreement is entitled to the rent for the day of the disposition. The examples are as follows:

Example 1. (i)(A) X and Y enter into a section 467 rental agreement for a 5-year lease of personal property beginning on January 1, 2000, and ending on December 31, 2004. The rental agreement provides that the calendar year will be the rental period and that rents accrue and are paid in the following pattern:

	Allocation	Payment
2000	\$0	\$0
2001	87,500	0
2002	87,500	175,000
2003	87,500	175,000
2004	87,500	0

(B) Assume that both X and Y are calendar year taxpayers and that 110 percent of the applicable Federal rate is 11 percent, compounded annually. Assume also that the rental agreement is a long-term agreement (as defined in § 1.467-3(b)(3)), but it is not a disqualified leaseback or long-term agreement. Further, because the agreement does not provide prepaid or deferred rent, proportional rental accrual is not applicable. (See § 1.467-2(b)(1)(i)). Therefore, the rent taken into account under § 1.467-1(d)(2) is the fixed rent allocated to the rental periods under § 1.467-1(c)(2)(ii).

(ii) On December 31, 2000, X sells the property subject to the section 467 rental agreement to an unrelated person for \$575,000. At the time of the sale, X's adjusted basis in the property is \$175,000. Thus, X's gain on the sale of the property is \$400,000. Assume that \$175,000 of this gain would be treated as ordinary income under provisions of the Internal Revenue Code other than section 467(c). Under paragraph (a) of this section, X is required to take the recapture

amount into account as ordinary income. Under paragraph (b) of this section, the recapture amount is the lesser of the prior understated inclusion or the section 467 gain.

(iii)(A) In computing the prior understated inclusion under paragraph (b)(2) of this section, assume that the section 467 rent and section 467 interest (based on constant rental accrual) would be taken into account as follows if the section 467 rental agreement were a disqualified long-term agreement:

	Section 467 rent	Section 467 interest
2000	\$65,812.55	\$0
2001	65,812.55	7,239.38
2002	65,812.55	15,275.09
2003	65,812.55	4,944.73
2004	65,812.55	(6,521.95)

(B) The total amount of section 467 rent and section 467 interest for 2000, based on constant rental accrual, is \$65,812.55. Since X did not take any section 467 rent or section 467 interest into account in 2000, the prior understated inclusion is also \$65,812.55. X's section 467 gain is \$225,000, which is the excess of the gain realized (\$400,000) over the amount of that gain treated as ordinary income under non-section 467 provisions (\$175,000). Accordingly, the recapture amount (the lesser of the prior understated inclusion or the section 467 gain) treated as ordinary income is \$65,812.55.

Example 2. (i) The facts are the same as in *Example 1*, except that the section 467 rental agreement specifies that rents accrue and are paid in the following pattern:

	Allocation	Payment
2000	\$60,000	\$0
2001	65,000	0
2002	70,000	175,000
2003	75,000	175,000
2004	80,000	0

(ii)(A) Assume the section 467 rental agreement does not provide for adequate interest under § 1.467-2(b), and, therefore, the fixed rent for a rental period is the proportional rental amount. See § 1.467-1(d)(2)(ii). Under § 1.467-2(c), the following amounts would be required to be taken into account:

	Section 467 rent	Section 467 interest
2000	\$57,260.43	\$0
2001	62,032.13	6,298.65
2002	66,803.83	13,815.03
2003	71,575.53	3,433.11
2004	76,347.23	(7,565.94)

(B) The amount of section 467 rent and section 467 interest taken into account by X for 2000 is \$57,260.43. Thus, the prior understated inclusion is \$8,552.12 (the excess of the amount of section 467 rent and section 467 interest based on constant rental accrual for 2000, \$65,812.55, over the amount of section 467 rent and section 467 interest actually taken into account, \$57,260.43). Since the prior understated inclusion is less

than the section 467 gain (\$225,000, as determined in *Example 1*(iii)(B)), the recapture amount treated as ordinary income is also \$8,552.12.

Example 3. (i) The facts are the same as in *Example 1*, except that, instead of selling the property, X transfers the property to S on December 31, 2002, in exchange for stock of S in a transaction that meets the requirements of section 351(a). Under paragraph (c)(3) of this section, because of the application of section 351, X is not required to take into account any section 467 recapture.

(ii) On December 31, 2003, S sells the property subject to the section 467 rental agreement to an unrelated person for \$450,000. At the time of the sale, S's adjusted basis in the property is \$105,000. Thus, S's gain on the sale of the property is \$345,000. Assume that \$245,000 of this gain would be treated as ordinary income under provisions of the Internal Revenue Code other than section 467(c). Under paragraph (a) of this section, S is required to take the recapture amount into account as ordinary income which, under paragraph (b) of this section, is the lesser of the prior understated inclusion or the section 467 gain.

(iii) S owned the property in 2003 and, under paragraph (c)(4) of this section, for purposes of determining S's prior understated inclusion, S is treated as if it had owned the property during the years 2000 through 2002. In computing S's prior understated inclusion under paragraph (b)(2) of this section, the section 467 rent and section 467 interest based on constant rental accrual are the same as the amounts set forth in the schedule in *Example 1*(iii)(A). Thus, the constant rental amount for 2000, 2001, 2002, and 2003 is \$290,709.40 ($(4 \times \$65,812.55) + \$7,239.38 + \$15,275.09 + \$4,944.73$). The section 467 rent and section 467 interest actually taken into account prior to the disposition is \$262,500. Thus, S's prior understated inclusion is \$28,209.40 ($\$290,709.40$ minus $\$262,500$ ($3 \times \$87,500$)). S's section 467 gain is \$100,000, the difference between the gain realized on the disposition (\$345,000) and the amount of gain that is treated as ordinary income under non-section 467 Code provisions (\$245,000). Accordingly, S's recapture amount, the lesser of the prior understated inclusion or the section 467 gain, is \$28,209.40.

(e) *Other rules relating to dispositions—(1) In general.* If there is a sale, exchange, or other disposition of property subject to a section 467 rental agreement (the transfer), the section 467 rent and, if applicable, section 467 interest for a period are taken into account by the owner of the property during the period. The following rules apply in determining the section 467 rent and section 467 interest for the portion of the rental period ending immediately prior to the transfer:

(i) The section 467 rent and section 467 interest for the portion of the rental period ending immediately prior to the transfer are a pro rata portion of the section 467 rent and the section 467

interest, respectively, for the rental period. Such amounts are also taken into account in determining the transferor's section 467 loan balance, prior to any adjustment thereof that may be required under paragraph (h) of this section, immediately before the transfer.

(ii) If the transferor of the property is entitled to the rent for the day of transfer, the transfer is treated as occurring at the end of the day of the transfer.

(iii) If the transferee of the property is entitled to the rent for the day of transfer, the transfer is treated as occurring at the beginning of the day of the transfer.

(2) *Treatment of section 467 loan.* If there is a transfer described in paragraph (e)(1) of this section, the following rules apply in determining the transferor's and the transferee's section 467 loans for the period after the transfer, the amount realized by the transferor, and the transferee's basis in the property:

(i) The beginning balance of the transferor's section 467 loan is equal to the net present value at the time of the transfer (but after giving effect to the transfer) of all subsequent amounts payable as fixed rent and interest on fixed rent to the transferor and all

subsequent amounts payable as interest on prepaid fixed rent by the transferor. The transferor must continue to take into account interest on the transferor's section 467 loan balance after the date of the transfer.

(ii) The beginning balance of the transferee's section 467 loan is equal to the principal balance of the transferor's section 467 loan immediately before the transfer reduced (below zero, if appropriate) by the beginning balance of the transferor's section 467 loan. Amounts payable to the transferor are not taken into account in adjusting the transferee's section 467 loan balance.

(iii) If the beginning balance of the transferee's section 467 loan is negative, the transferor and transferee must treat the balance as a liability that is either assumed in connection with the transfer of the property or secured by the property acquired subject to the liability. If the beginning balance of the transferee's section 467 loan is positive, the transferor and transferee must treat the balance as an additional asset acquired in connection with the transfer of the property. In the case of a positive beginning balance of the transferee's section 467 loan, the transferee will have an initial cost basis in the section 467 loan equal to the lesser of the

beginning balance of the loan or the aggregate consideration for the transfer of the property subject to the section 467 rental agreement and the transfer of the transferor's interest in the section 467 loan.

(3) [Reserved].

(4) *Examples.* The following examples illustrate the application of this paragraph (e). In each of these examples the transferor of property subject to a section 467 rental agreement is entitled to the rent for the day of the transfer. The examples are as follows:

Example 1. (i) Q and R enter into a section 467 rental agreement for a 5-year lease of personal property beginning on January 1, 2000, and ending on December 31, 2004. The rental agreement provides that \$0 of rent is allocated to 2000, 2001, and 2002, and \$1,750,000 is allocated to each of the years 2003 and 2004. The rental agreement provides that the calendar year will be the rental period and that the rent allocated to each calendar year is payable on the last day of that calendar year. Assume that both Q and R are calendar year taxpayers and that 110 percent of the applicable Federal rate is 11 percent, compounded annually. Assume further that the rental agreement is a disqualified long-term agreement (as defined in § 1.467-3(b)(3)) and that the section 467 rent, the section 467 interest, and the section 467 loan balance would be the following amounts:

Calendar year	Payment	Section 467 interest	Section 467 rent	Section 467 loan balance
2000	\$0	\$0	\$592,905.87	\$592,905.87
2001	0	65,219.65	592,905.87	1,251,031.39
2002	0	137,613.45	592,905.87	1,981,550.71
2003	1,750,000.00	217,970.58	592,905.87	1,042,427.16
2004	1,750,000.00	114,666.97	592,905.87	0

(ii) On December 31, 2002, Q sells the property subject to the section 467 rental agreement to P, an unrelated person, for \$3,000,000. Q does not retain the right to receive any amounts payable by R under the rental agreement after the date of sale, but the agreement is not otherwise modified. At the time of the sale, Q's adjusted basis in the property is \$975,000. Assume that, under § 1.467-1(f)(7), the disposition is not a substantial modification. Further, the Commissioner does not determine that the treatment of the agreement as a disqualified long-term agreement should be changed and, under § 1.467-1(f)(4)(iii), the agreement remains subject to constant rental accrual. Thus, under paragraph (g)(2)(iii) of this section, section 467 rent and section 467 interest for periods after the disposition will be taken into account on the basis of constant rental accrual applied to the terms of the entire agreement (as modified).

(iii) Under paragraph (e)(2)(ii) of this section, the beginning balance of P's section 467 loan is \$1,981,550.71. P's section 467 loan balance is computed by reducing the balance of the section 467 loan immediately

before the transfer (\$1,981,550.71) by the beginning balance of the transferor's section 467 loan (\$0 because Q does not retain the right to receive any amounts payable under the rental agreement subsequent to the transfer).

(iv) Q will be treated as if it had received \$1,981,550.71 from the disposition of the section 467 loan and \$1,018,449.29 from the sale of the property subject to the rental agreement. Thus, Q's gain on the sale of the property is \$43,449.29 (\$1,018,449.29 amount realized less \$975,000 adjusted basis). Q's gain is not subject to the recapture provisions of section 467(c) and paragraph (a) of this section because the rental agreement was disqualified under § 1.467-3(b)(1) and, thus, the requirement of paragraph (a)(2) of this section is not met. Q recognizes no gain on the disposition of the section 467 loan because Q's basis in the loan equals the amount considered received for the loan. Further, Q does not take into account any of the section 467 rent or section 467 interest attributable to periods after the transfer of the property.

(v) P is treated as if it had acquired the property and the positive balance in the transferee's section 467 loan. P's cost basis in the property is \$1,018,449.29, and its cost basis in the section 467 loan immediately following the transfer is \$1,981,550.71. P takes section 467 rent and section 467 interest into account for the calendar years 2002 and 2003 under the constant rental accrual method and, accordingly, treats payments received under the rental agreement as recoveries of the principal balance of the section 467 loan (as adjusted from time to time).

Example 2. (i) The facts are the same as *Example 1*, except that on December 31, 2002, Q transfers the property to P in exchange for stock of P having a fair market value of \$3,000,000 and the transaction meets the requirements of section 351(a).

(ii) Q is treated as having transferred two assets to P, the property subject to the rental agreement and the positive balance of the section 467 loan. Under section 351(a), because only stock of P is received by Q, Q does not recognize any of the gain realized on the transaction. Pursuant to section

358(a), the basis of Q in the P stock received in the exchange is the same as the aggregate basis of the property exchanged, or \$2,956,550.71 (the sum of the balance of the section 467 loan, \$1,981,550.71, and the adjusted basis of the property, \$975,000). Q does not take into account any of the section 467 rent or section 467 interest attributable to periods after the transfer of the property.

(iii) P is treated as if it had acquired the property and the positive balance in the transferee's section 467 loan in the transaction. Pursuant to section 362(a), P's basis in each asset is the same as the basis of Q immediately preceding the transfer. Thus, the basis of P in the property subject to the rental agreement is \$975,000, and the basis of P in the section 467 loan immediately following the transfer is \$1,981,550.71. P takes section 467 rent and section 467 interest into account for the calendar years 2003 and 2004 under the constant rental accrual method and, accordingly, treats payments received under the rental agreement as recoveries of the principal balance of the section 467 loan (as adjusted from time to time).

(f) Treatment of assignments by lessee and lessee-financed renewals—(1) Substitute lessee use.

If a lessee assigns its interest in a section 467 rental agreement to a substitute lessee, or if a period when a substitute lessee has the use of property subject to a section 467 rental agreement is otherwise included in the lease term under § 1.467-1(h)(6), the section 467 rent for a period is taken into account by the person having the use of the property during the period. The following rules apply in determining the section 467 rent and section 467 interest for the portion of the rental period ending immediately prior to the assignment:

(i) The section 467 rent and section 467 interest for the portion of the rental period ending immediately prior to the assignment are a pro rata portion of the section 467 rent and the section 467 interest, respectively, for the rental period. Such amounts are also taken into account in determining the lessee's section 467 loan balance, prior to any adjustment thereof that may be required under paragraph (h) of this section, immediately before the substitute lessee first has use of the property.

(ii) If the lessee is liable for the rent for the day that the substitute lessee first has use of the property, the substitute lessee's use shall be treated as beginning at the end of that day.

(iii) If the substitute lessee is liable for the rent for the day that the substitute lessee first has use of the property, the substitute lessee's use shall be treated as beginning at the beginning of that day.

(2) *Treatment of section 467 loan.* If, as described in paragraph (f)(1) of this section, a lessee assigns its interest in a section 467 rental agreement to a

substitute lessee or a period when a substitute lessee has the use of property subject to a section 467 rental agreement is otherwise included in the lease term under § 1.467-1(h)(6), the following rules apply in determining the amount of the lessee's and the substitute lessee's section 467 loans for the period when the substitute lessee has use of the property and in computing the taxable income of the lessee and substitute lessee:

(i) The beginning balance of the lessee's section 467 loan is equal to the net present value, as of the time the substitute lessee first has use of the property (but after giving effect to the transfer of the right to use the property), of all amounts subsequently payable by the lessee as fixed rent and interest on fixed rent and all amounts subsequently payable as interest on prepaid fixed rent to the lessee. For purposes of this paragraph (f), any amount otherwise payable by the lessee is not treated as an amount subsequently payable by the lessee to the extent that such payment, if made by the lessee, would give rise to a right of contribution or other similar claim against the substitute lessee or any other person. The lessee must continue to take into account interest on the lessee's section 467 loan balance after the substitute lessee first has use of the property.

(ii) The beginning balance of the substitute lessee's section 467 loan is equal to the principal balance of the lessee's section 467 loan immediately before the substitute lessee first has use of the property reduced (below zero, if appropriate) by the beginning balance of the lessee's section 467 loan. Amounts payable by the lessee to any person other than the substitute lessee (or a related person) or payable to the lessee by any person other than the substitute lessee (or a related person) are not taken into account in adjusting the substitute lessee's section 467 loan balance.

(iii) If the beginning balance of the substitute lessee's section 467 loan is positive, the beginning balance is treated as—

(A) Gross receipts of the lessee for the taxable year in which the substitute lessee first has use of the property; and

(B) A liability that is either assumed in connection with the transfer of the leasehold interest to the substitute lessee or secured by property acquired subject to the liability.

(iv) If the beginning balance of the substitute lessee's section 467 loan is negative, the following rules apply:

(A) If the principal balance of the lessee's section 467 loan immediately before the substitute lessee first has use of the property was negative, any

consideration paid by the substitute lessee to the lessee in conjunction with the transfer of the use of the property shall be treated as a nontaxable return of capital to the lessee to the extent that—

(1) The consideration does not exceed the amount owed to the lessee under the lessee's section 467 loan balance immediately before the substitute lessee first has use of the property; and

(2) The lessee has basis in the principal balance of the lessee's section 467 loan immediately before the substitute lessee first has use of the property.

(B) Except as provided in paragraph (f)(2)(iv)(D) of this section, the excess, if any, of the beginning balance of the amount owed to the substitute lessee under the section 467 loan, over any consideration paid by the substitute lessee to the lessee in conjunction with the transfer of the use of the property, is treated as an amount incurred by the lessee for the taxable year in which the substitute lessee first has use of the property.

(C) To the extent the beginning balance of the amount owed to the substitute lessee under the section 467 loan exceeds any consideration paid by the substitute lessee to the lessee in conjunction with the transfer of the use of the property, repayments of the beginning balance are items of gross income of the substitute lessee in the taxable year in which repayment occurs (determined by applying any repayment first to the beginning balance of the substitute lessee's section 467 loan).

(D) Any amount incurred by the lessee under paragraph (f)(2)(iv)(B) of this section with respect to a transfer of the use of property (the current transfer) shall be reduced (but not below zero) to the extent that the lessee, in its capacity, if any, as a substitute lessee with respect to an earlier transfer of the use of the property would have recognized additional gross income under paragraph (f)(2)(iv)(C) of this section if the current transfer had not occurred.

(v) For purposes of paragraph (f)(2)(iv)(C) of this section, repayments occur as the negative balance is amortized through the net accrual of rent and negative interest.

(3) *Lessor use.* If a period when the lessor has the use of property subject to a section 467 rental agreement is included in the lease term under § 1.467-1(h)(6), the section 467 rent for the period is not taken into account and the lessor is treated as a substitute lessee for purposes of this paragraph (f).

(4) *Examples.* The following examples illustrate the application of this paragraph (f). In each of these examples,

the substitute lessee is liable for the rent for the day on which the substitute lessee first has use of the property subject to the section 467 rental agreement. Further, assume that in each example the lessee assignment is not a substantial modification under § 1.467-1(f). The examples are as follows:

Example 1. (i) The facts are the same as in *Example 1* of paragraph (e)(4) of this section, except that on December 31, 2001, R, the lessee, contracts to assign its entire remaining interest in the leasehold to S, a calendar year taxpayer. The assignment becomes effective at the beginning of January 1, 2002. Pursuant to the terms of the assignment, R agrees with S that R will make \$1,400,000 of the

\$1,750,000 rental payment required on December 31, 2003.

(ii) Under paragraph (f)(2)(i) of this section, R's section 467 loan balance as of the beginning of January 1, 2002, the time S first has use of the property, is \$1,136,271.41 (\$1,400,000/(1.11)²). Under paragraph (f)(2)(ii) of this section, S's section 467 loan balance as of the beginning of January 1, 2002, is \$114,759.98 (the principal balance of R's section 467 loan immediately before S has use of the property (\$1,251,031.39), less R's section 467 loan balance at the beginning of January 1, 2002 (\$1,136,271.41)).

(iii) Because S's \$114,759.98 section 467 loan balance is positive, under paragraph (f)(2)(iii)(A) of this section, such amount is treated as gross receipts of R for 2002, R's taxable year in which S first has use of the

property. R will treat the \$114,759.98 as an amount received in exchange for the transfer of the leasehold interest. Under paragraph (f)(2)(iii)(B) of this section, S will treat that amount as a liability assumed in acquiring the leasehold interest. Thus, S's cost basis in the leasehold interest is \$114,759.98.

(iv) Under paragraph (f)(1) of this section, S takes the section 467 rent attributable to the property into account for the period beginning on January 1, 2002. For 2002, S takes section 467 interest into account based on S's section 467 loan balance at the beginning of 2002. S's amounts payable, section 467 rent, section 467 interest, and end-of-year section 467 loan balances for calendar years 2002 through 2004 are as follows:

Calendar year	Payment	Section 467 interest	Section 467 rent	Section 467 loan balance
Beginning				\$114,759.98
2002	\$0	\$12,623.60	\$592,905.87	720,289.45
2003	350,000.00	79,231.83	592,905.87	1,042,427.15
2004	1,750,000.00	114,666.98	592,905.87	0

(v) Under paragraph (f)(2)(i) of this section, R must continue to take into account section 467 interest on R's section 467 loan balance after S first has use of the property. R's section 467 loan balance beginning when S first has use of the property is \$1,136,271.41. R's section 467 interest and end-of-year section 467 loan balances for calendar years 2002 through 2003 are as follows:

Calendar year	Payment	Section 467 interest	Section 467 loan balance
Beginning			\$1,136,271.41
2002	\$0	\$124,989.85	1,261,261.26
2003	1,400,000.00	138,738.74	0

Example 2. (i) On January 1, 2000, B leases tangible personal property from C for a period of five years. The rental agreement provides that the rental period is the calendar year and that rent payments are due at the end of the calendar year. The rental agreement does not provide for interest on prepaid rent. Assume that B and C are both calendar year taxpayers and that 110 percent of the applicable Federal rate is 10 percent, compounded annually. The rental agreement allocates rents and provides for payments of rent as follows:

Calendar year	Rent	Payments
2000	\$200,000	\$400,000
2001	200,000	300,000
2002	200,000	200,000
2003	200,000	100,000
2004	200,000	0

(ii) The rental agreement has prepaid rent within the meaning of § 1.467-1(c)(3)(ii) because the cumulative amount of rent

payable through the end of 2001 (\$700,000) exceeds the cumulative amount of rent allocated to calendar years 2000 through 2002 (\$600,000). Because the rental agreement does not provide for adequate interest on prepaid fixed rent, the rent for each calendar year during the lease term is the proportional rental amount, as described in § 1.467-2(c). The amounts payable, section 467 rent, section 467 interest, and end-of-year section 467 loan balances for each calendar year are as follows:

Calendar year	Payment	Section 467 interest	Section 467 rent	Section 467 loan balance
2000	\$400,000	\$0	\$218,987.40	(\$181,012.60)
2001	300,000	(18,101.26)	218,987.40	(280,126.46)
2002	200,000	(28,012.64)	218,987.40	(289,151.70)
2003	100,000	(28,915.17)	218,987.40	(199,079.47)
2004	0	(19,907.93)	218,987.40	0

(iii) On December 31, 2001, B contracts to assign its entire remaining interest in the leasehold to D, a calendar year taxpayer. The assignment becomes effective at the beginning of January 1, 2002. D pays B \$278,000 on January 1, 2002, in conjunction with the assignment of the leasehold interest. Under the terms of the assignment, B is not obligated to make any rental payments due after the assignment.

(iv) Under paragraph (f)(2)(i) of this section, B's section 467 loan balance as of the beginning of January 1, 2002, the time D first has use of the property, is zero because D is obligated to make all rent payments due after the assignment of the leasehold interest. Under paragraph (f)(2)(ii) of this section, D's section 467 loan balance as of the beginning of January 1, 2002, is negative \$280,126.46 (the principal balance of B's section 467 loan immediately before D has use of the property

(negative \$280,126.46), less B's section 467 loan balance when D first has use of the property (zero)). Because D's beginning section 467 loan balance is negative, paragraph (f)(2)(iv) of this section applies.

(v) Because B's \$280,126.46 section 467 loan balance at the end of 2001 (that is, immediately before D has use of the property) is negative, paragraph (f)(2)(iv)(A) of this section applies. B's loan balance is the amount owed to B under the section 467 loan

and consists of the excess of B's payments to C over the net amount of rent and negative interest B has taken into account through the end of 2001. Thus, B's basis in the negative section 467 loan balance at the end of 2001 is \$280,126.46. Because the \$278,000 paid by D to B in conjunction with the transfer of the leasehold interest does not exceed the amount owed to B under the section 467 loan at the end of 2001, and does not exceed B's basis in that loan balance, under paragraph (f)(2)(iv)(A) of this section B treats the \$278,000 payment from D as a nontaxable return of capital.

(vi) The beginning balance of the amount owed to D under the section 467 loan (\$280,126.46) exceeds by \$2,126.46 the \$278,000 paid by D to B in conjunction with the transfer of the leasehold interest. Paragraph (f)(2)(iv)(B) of this section treats the \$2,126.46 as an amount incurred by B in 2002, B's taxable year in which D first has use of the property. Paragraph (f)(2)(iv)(D) of this section does not apply to reduce the amount incurred by B because B is the original lessee under the section 467 rental agreement.

(vii) Under paragraph (f)(1) of this section, D takes the section 467 rent into account for the period beginning when D first has use of the property. D takes section 467 interest into account based on a beginning section 467 loan balance of negative \$280,126.46.

(viii) The beginning balance of the amount owed to D under the section 467 loan (\$280,126.46) exceeds by \$2,126.46 the \$278,000 paid by D to B in conjunction with the transfer of the leasehold interest. Under paragraph (f)(2)(iv)(C) of this section, D must include this amount in gross income in 2002, the year in which this amount of D's beginning section 467 loan balance is paid through the net accrual of rent and negative interest. This inclusion in gross income ensures that the reductions in D's taxable income attributable to the section 467 rental agreement will not exceed the actual amount of D's expenditures.

(g) *Application of section 467 following a rental agreement modification*—(1) *Substantial modifications.* The following rules apply to any substantial modification of a rental agreement occurring after May 18, 1999 unless the entire agreement (as modified) is treated as a single agreement under § 1.467-1(f)(4)(vi):

(i) *Treatment of pre-modification items.* The lessor and lessee must take pre-modification items (within the meaning of § 1.467-1(f)(5)(v)) into account under their method of accounting used before the modification to report income and expense attributable to the rental agreement.

(ii) *Computations with respect to post-modification items.* In computing section 467 rent, section 467 interest, and the amount of the section 467 loan with respect to post-modification items—

(A) Post-modification items are treated as provided under a rental

agreement (the post-modification agreement) separate from the agreement under which pre-modification items are provided;

(B) The lease term of the post-modification agreement begins at the beginning of the first period for which rent other than pre-modification rent is provided; and

(C) The applicable Federal rate for the post-modification agreement is the applicable Federal rate in effect on the day on which the modification occurs.

(iii) *Adjustments*—(A) *Adjustment relating to certain prepayments.* If any payments before the beginning of the lease term of the post-modification agreement are post-modification items, the lessor and lessee must take into account, in the taxable year in which the modification occurs, any adjustment necessary to prevent duplication with respect to such payments or the omission of interest thereon for periods before the beginning of the lease term.

(B) *Adjustment relating to retroactive beginning of lease term.* If the lease term of a post-modification agreement begins before the date on which the modification occurs, the lessor and lessee must take into account in the taxable year in which the modification occurs any amount necessary to prevent the duplication or omission of rent or interest for the period after the beginning of the lease term of the post-modification agreement and before the beginning of the taxable year in which the modification occurs. For this purpose, the amount necessary to prevent duplication or omission is determined after taking into account any adjustments required by the Commissioner for taxable years ending prior to the beginning of the taxable year in which the modification occurs. In determining any adjustments required by the Commissioner for taxable years ending prior to the beginning of the taxable year in which the modification occurs, the Commissioner will disregard the modification.

(iv) *Coordination with rules relating to dispositions and assignments*—(A) *Dispositions.* If the modification involves a sale, exchange, or other disposition of the property subject to the rental agreement—

(1) Adjustments required under this paragraph (g) are taken into account before applying paragraphs (a), (b), (c), and (e) of this section;

(2) The prior understated inclusion for purposes of paragraph (b) of this section is the sum of the prior understated inclusion with respect to pre-modification items and the prior understated inclusion with respect to post-modification items; and

(3) Paragraph (e) of this section applies separately with respect to pre-modification items and post-modification items.

(B) *Assignments.* If the modification involves an assignment of the lessee's interest in the rental agreement to a substitute lessee or a substitute lessee having use of the property during a period otherwise included in the lease term—

(1) Adjustments required under this paragraph (g) are taken into account before applying paragraph (f) of this section; and

(2) Paragraph (f) of this section applies separately with respect to pre-modification items and post-modification items.

(2) *Other modifications.* The following rules apply to a modification (other than a substantial modification) of a rental agreement occurring after May 18, 1999:

(i) *Computation of section 467 loan for modified agreement.* The amount of the section 467 loan relating to the agreement is computed as of the effective date of the modification. The section 467 rent and section 467 interest for periods before the effective date of the modification are determined, solely for purposes of computing the amount of the section 467 loan, under the terms of the entire agreement (as modified).

(ii) *Change in balance of section 467 loan.* (A) If the balance of the section 467 loan determined under paragraph (g)(2)(i) of this section is greater than the balance of the section 467 loan immediately before the effective date of the modification, the difference is taken into account, in the taxable year in which the modification occurs, as additional rent.

(B) If the balance of the section 467 loan determined under paragraph (g)(2)(i) of this section is less than the balance of the section 467 loan immediately before the effective date of the modification, the difference is taken into account, in the taxable year in which the modification occurs, as a reduction of the rent previously taken into account by the lessor and lessee.

(C) For purposes of this paragraph (g)(2)(ii), a negative balance is less than a positive balance, a zero balance, or any other negative balance that is closer to a zero balance.

(iii) *Section 467 rent and interest after the modification.* The section 467 rent and section 467 interest for periods after the effective date of the modification are determined under the terms of the entire agreement (as modified).

(iv) *Applicable Federal rate.* The applicable Federal rate for the

agreement does not change as a result of the modification.

(v) *Modification effective within a rental period.* If the effective date of a modification does not coincide with the beginning or end of a rental period under the agreement in effect before the modification, the section 467 rent and section 467 interest for the portion of the rental period ending immediately prior to the effective date of the modification are a pro rata portion of the section 467 rent and the section 467 interest, respectively, for the rental period. Such amounts are also taken into account in determining the section 467 loan balance, prior to any adjustment thereof that may be required under paragraph (h) of this section, immediately before the effective date of the modification. Similar rules apply with respect to the section 467 rent and section 467 interest determined under the terms of the entire agreement (as modified) for purposes of computing the amount of the section 467 loan under paragraph (g)(2)(i) of this section and the section 467 rent and section 467 interest for a partial rental period beginning on the effective date of the modification.

(vi) *Other adjustments.* The lessor and lessee must take into account, in the taxable year in which a retroactive modification occurs, any amount necessary to prevent the duplication or omission of rent or interest for the period before the beginning of the taxable year in which the modification occurs.

(vii) *Coordination with rules relating to dispositions and assignments.* If the modification involves a sale, exchange, or other disposition of the property subject to the rental agreement, an assignment of the lessee's interest in the rental agreement to a substitute lessee or a substitute lessee having use of the property during a period otherwise included in the lease term, adjustments required under this paragraph (g) are taken into account before applying paragraphs (a), (b), (c), (e), and (f) of this section.

(viii) *Exception for agreements entered into prior to effective date of section 467.* This paragraph (g)(2) does not apply to a modification of a rental agreement that is not subject to section 467 because of the effective date provisions of section 92(c) of the Tax Reform Act of 1984 (Public Law 98-369 (98 Stat. 612)).

(3) *Adjustment by Commissioner.* If the entire agreement (as modified) is treated as a single agreement under § 1.467-1(f)(4)(vi), the Commissioner may require adjustments to taxable

income to reflect the effect of the modification, including adjustments that are similar to those required under paragraph (g)(2) of this section.

(4) *Effective date of modification.* The effective date of a modification of a rental agreement occurs at the earliest of—

(i) The date on which the modification occurs;

(ii) The beginning of the first period for which the amount of rent or interest provided under the entire agreement (as modified) differs from the amount of rent or interest provided under the agreement in effect before the modification;

(iii) The due date of the first payment, under either the entire agreement (as modified) or the agreement in effect before the modification, that is not identical, in due date and amount, under both such agreements;

(iv) The date, in the case of a modification involving the substitution of a new lessor, on which the property subject to the rental agreement is transferred; or

(v) The date, in the case of a modification involving the substitution of a new lessee, on which the substitute lessee first has use of the property subject to the rental agreement.

(5) *Examples.* The following examples illustrate the application of this paragraph (g):

Example 1. (i) F, a cash method lessor, and G, an accrual method lessee, agree to a 7-year lease of tangible personal property for the period beginning on January 1, 1998, and ending on December 31, 2004. The rental agreement allocates \$100,000 of rent to each calendar year during the lease term, such rent to be paid December 31 following the close of the calendar year to which it is allocated. Because the rental agreement does not provide for increasing rent, or deferred rent within the meaning of section 467(d)(1)(A), section 467 does not apply to the rental agreement.

(ii) Prior to January 1, 2001, G timely makes the \$100,000 rental payments required as of December 31, 1999, and December 31, 2000. On January 1, 2001, F and G modify the rental agreement payment schedule to provide for a single final payment of \$500,000 on December 31, 2004. Assume that the change is a substantial modification within the meaning of § 1.467-1(f)(5)(ii). Because the modification occurs after May 18, 1999, the post-modification agreement is treated, under § 1.467-1(f)(1), as a new agreement for purposes of determining whether it is a section 467 rental agreement.

(iii) Under § 1.467-1(f)(5)(v), the \$200,000 of rent allocated to calendar years 1998 and 1999 (periods prior to the modification) constitutes pre-modification rent, and the \$100,000 rent payments made on December 31, 1999, and December 31, 2000, constitute pre-modification payments. Although

calendar year 2000 is also prior to the modification, the rent allocated to calendar year 2000 is not pre-modification rent and the related payment is not a pre-modification payment because the modification changed the time at which that rent is payable. See § 1.467-1(f)(5)(v)(A).

(iv) Under paragraph (g)(1)(i) of this section, F and G take pre-modification rent and pre-modification payments into account under the method of accounting they used to report income and deductions attributable to the pre-modification agreement.

(v) Under § 1.467-1(f)(1)(i), the post-modification agreement providing rent for the period beginning on January 1, 2000, and ending on December 31, 2004, is treated as a new rental agreement. This rental agreement allocates \$100,000 of rent to each of the calendar years 2000 through 2004 and provides for a single rental payment of \$500,000 on December 31, 2004. Because the post-modification agreement provides for deferred rent under § 1.467-1(c)(3)(i), section 467 applies. Further, the post-modification agreement does not provide for adequate interest on fixed rent, and therefore F and G must account for fixed rent and interest on fixed rent using proportional rental accrual. Under paragraph (g)(1)(iii) of this section, for their taxable years which include January 1, 2001, F and G must adjust reported rent for the difference between the rent taken into account for the calendar year 2000 under the unmodified agreement and the proportional rental amount for that year under the post-modification agreement.

Example 2. (i) On January 1, 2000, X, lessee, and Y, lessor, enter into a rental agreement for a 6-year lease of tangible personal property beginning January 1, 2000, and ending December 31, 2005. The agreement provides that the calendar year is the rental period and all rent payments are due on July 15 of all years in which a payment is required. Assume the agreement is not a disqualified leaseback or long-term agreement within the meaning of § 1.467-3(b), and has the following allocation schedule and payment schedule:

Year	Allocation	Payment
2000	\$800,000	\$0
2001	900,000	0
2002	1,000,000	1,500,000
2003	1,000,000	1,500,000
2004	1,100,000	1,500,000
2005	1,200,000	1,500,000

(ii) The rental agreement has deferred rent within the meaning of § 1.467-1(c)(3)(i) because the rent allocated to 2000 is not payable until 2002 and some of the rent allocable to 2001 is not payable until 2003. Further, the rental agreement does not provide adequate interest on fixed rent within the meaning of § 1.467-2(b). Therefore, the rent amount to be accrued by X and Y for each rental period is the proportional rental amount, as described in § 1.467-2(c). Assuming 110 percent of the applicable Federal rate is 10 percent compounded annually, the section 467 rent, interest, and loan balances are as follows:

Year	Rent	Interest	Loan balance
2000	\$736,949.55	\$0	\$736,949.55
2001	829,068.24	73,694.96	1,639,712.75
2002	921,186.94	163,971.28	1,224,870.97
2003	921,186.94	122,487.10	768,545.01
2004	1,013,305.63	76,854.50	358,705.14
2005	1,105,424.33	35,870.53	0

(iii)(A) On January 1, 2004, X and Y agree that the \$1,500,000 payment scheduled for July 15, 2005, will be made in three equal installments on June 15, 2005, July 15, 2005, and August 15, 2005. Under § 1.467-1(j)(2)(i)(C) (relating to timing conventions), the payment to be made on June 15, 2005, is treated as if it were payable on December 31, 2004, for purposes of determining present values and yield of the section 467 loan. Assume that this change, which results in the following allocation schedule and payment schedule, is not a substantial modification within the meaning of § 1.467-1(f)(5)(ii):

Year	Allocation	Payment
2000	\$800,000	\$0
2001	900,000	0
2002	1,000,000	1,500,000
2003	1,000,000	1,500,000
2004	1,100,000	2,000,000
2005	1,200,000	1,000,000

(B) The agreement remains subject to proportional rental accrual after the modification because it has deferred rent and does not provide adequate interest on fixed rent within the meaning of § 1.467-2(b).

(iv) Because the modification occurs after May 18, 1999, and is not substantial within

the meaning of § 1.467-1(f)(5)(ii), paragraph (g)(2) of this section applies. Under paragraph (g)(2)(i) of this section, the amount of the section 467 loan relating to the modified agreement is computed as of the effective date of the modification, and, solely for purposes of recomputing the amount of the section 467 loan, the section 467 rent and section 467 interest for periods before the modification are determined under the terms of the entire agreement (as modified). In addition, the applicable Federal rate does not change as a result of the modification. Thus, the recomputed section 467 rent, interest, and loan balances are as follows:

Year	Rent	Interest	Loan balance
2000	\$ 742,242.59	\$ 0	\$ 742,242.59
2001	835,022.91	74,224.26	1,651,489.76
2002	927,803.24	165,148.98	1,244,441.98
2003	927,803.24	124,444.20	796,689.42
2004	1,020,583.56	79,668.94	(103,058.08)
2005	1,113,363.88	(10,305.80)	0

(v) Under paragraph (g)(2)(ii) of this section, the difference between the section 467 loan balance immediately before the effective date of the modification and the recomputed section 467 loan balance as of the effective date of the modification is taken into account. In this example, the loan balance immediately before the effective date of the modification is \$768,545.01 and the recomputed loan balance as of the effective date of the modification is \$796,689.42. Thus, because the recomputed loan balance exceeds the original loan balance, the difference (\$28,144.41) is taken into account, in the taxable year in which the modification occurs, as additional rent. Beginning on January 1, 2004, section 467 rent and interest are taken into account by X and Y in accordance with the recomputed rent schedule set forth in paragraph (iv) of this example.

(h) *Omissions or duplications*—(1) *In general.* In applying the rules of this section in conjunction with the rules of §§ 1.467-1 through 1.467-5, adjustments must be made to the extent necessary to prevent the omission or duplication of items of income, deduction, gain, or loss. For example, if a transferee lessor acquires property subject to a section 467 rental agreement at other than the beginning or end of a rental period, and the transferee lessor's beginning section 467 loan balance differs from the transferor lessor's

section 467 loan balance immediately prior to the transfer, it will be necessary to treat the rental period that includes the day of transfer as consisting of two rental periods, one beginning at the beginning of the rental period that includes the day of transfer and ending with or immediately prior to the transfer and one beginning with or immediately after the transfer and ending immediately prior to the beginning of the succeeding rental period. Because the substitution of two rental periods for one rental period may change the proportional rental amount or constant rental amount, the change in rental periods should be treated as a modification of the rental agreement that occurs immediately prior to the transfer. The change in rental periods, by itself, is not treated as a substantial modification of the rental agreement although the substitution of a new lessor may constitute a substantial modification of the rental agreement. Likewise, § 1.467-1(j)(2), which provides rules regarding when amounts are treated as payable, is designed to simplify calculations of present values, section 467 loan balances, and proportional and constant rental amounts. These simplifying conventions assume that there will be no change in

the lessor or lessee under a section 467 rental agreement and that the terms of the section 467 rental agreement will not be modified. Therefore, as illustrated in the example in paragraph (h)(2) of this section, when actual events do not reflect these assumptions, it may be necessary to alter the application of these rules to properly reflect taxable income.

(2) *Example.* The following example illustrates an application of this paragraph (h):

Example. (i) J leases tangible personal property from K for five years beginning on January 1, 2000, and ending on December 31, 2004. Under the rental agreement, rent is payable on July 15 of the calendar year to which it is allocated. Both J and K treat the calendar year as the rental period. The allocation of rent and payments of rent required under the rental agreement are as follows:

Calendar year	Rent	Payments
2000	\$200,000	\$450,000
2001	200,000	250,000
2002	200,000	200,000
2003	200,000	100,000
2004	200,000	0

(ii) The rental agreement does not provide for interest on prepaid rent. The rental

agreement has prepaid rent under § 1.467-1(c)(3)(ii) because the rent payable at the end of 2000 exceeds the cumulative amount of rent allocated to 2000 and 2001. Therefore, J and K must take section 467 rent into

account under the proportional rental method of § 1.467-2(c). Assume that 110 percent of the applicable Federal rate is 10 percent, compounded annually. The section 467 rent, section 467 interest, amounts

payable, and section 467 loan balances for each of the calendar years under the terms of the rental agreement are as follows:

Calendar Year	Section 467 rent	Section 467 interest	Payments	Section 467 loan balance
2000	\$220,077.48	\$0	\$450,000	\$(229,922.52)
2001	220,077.48	(22,992.25)	250,000	(282,837.29)
2002	220,077.48	(28,283.73)	200,000	(291,043.54)
2003	220,077.48	(29,104.35)	100,000	(200,070.41)
2004	220,077.48	(20,007.07)	0	0

(iii) On January 1, 2002, J and K amend the terms of the rental agreement to advance the due date of the \$200,000 payment originally due on July 15, 2002, to June 15, 2002. This change in the payment schedule constitutes a modification of the terms of the rental agreement within the meaning of § 1.467-1(f)(5)(i). Assume, however, that the change

is not a substantial modification within the meaning of § 1.467-1(f)(5)(ii). Because the modification occurs after May 18, 1999, and is not substantial, paragraph (g)(2) of this section applies. Thus, the section 467 loan balance at the beginning of 2002 must be recomputed as if the June 15, 2002, payment date had been included in the terms of the

pre-modification rental agreement. If this had been the case, the section 467 rent, section 467 interest, amounts payable, and section 467 loan balances for each of the calendar years under the terms of the rental agreement would have been as follows:

Calendar	Section 467 rent	Section 467 interest	Payments	Section 467 loan balance
2000	\$224,041.38	\$0	\$450,000	\$(225,958.62)
2001	224,041.38	(22,595.86)	450,000	(474,513.10)
2002	224,041.38	(47,451.31)	0	(297,923.03)
2003	224,041.38	(29,792.30)	100,000	(203,673.95)
2004	224,041.38	(20,367.43)	0	0

(iv) Section 1.467-4(b)(3) incorporates the conventions of § 1.467-1(j)(2) in determining when amounts are treated as payable for purposes of determining the section 467 loan balance. Section 1.467-1(j)(2)(i)(C) treats amounts payable during the first half of any rental period except the first rental period as payable on the last day of the preceding rental period. Therefore, because June 15, 2002, occurs in the first half of 2002, in determining the section 467 loan balance at the beginning of 2002 under the amended terms of the rental agreement, the \$200,000 payment due on June 15, 2002, is treated as payable on December 31, 2001.

(v) Under paragraph (g)(2)(ii)(B) of this section, if the recomputed section 467 loan balance is less than the section 467 loan balance immediately before the modification, the difference is taken into account as a reduction of the rent previously taken into account by the lessor and the lessee. In this example, the recomputed section 467 loan balance immediately after the modification is negative \$474,513.10 and the section 467 loan balance immediately before the modification is negative \$282,837.29. However, the section 467 loan balance immediately before the modification does not take into account the \$200,000 payment originally payable on July 15, 2002, whereas, under the conventions of § 1.467-1(j)(2)(i)(C), the recomputed section 467 loan balance immediately after the modification takes into account that \$200,000 payment because it is now payable in the first half of the rental period (June 15). Under these circumstances, if the recomputed section 467 loan balance immediately after the modification is treated as negative \$474,513.10 for purposes of

applying paragraph (g)(2)(ii)(B) of this section, K's gross income and J's deductions attributable to the section 467 rental agreement will be understated by \$200,000. Therefore, under paragraph (h)(1) of this section, only for purposes of applying paragraph (g)(2)(ii)(B) of this section, the \$200,000 payment due on June 15, 2002, should not be taken into account in determining the recomputed section 467 loan balance immediately after the modification.

§ 1.467-8 Automatic consent to change to constant rental accrual for certain rental agreements.

(a) *General rule.* For the first taxable year ending after May 18, 1999, a taxpayer may change to the constant rental accrual method, as described in § 1.467-3, for all of its section 467 rental agreements described in paragraph (b) of this section. A change to the constant rental accrual method is a change in method of accounting to which the provisions of sections 446 and 481 and the regulations thereunder apply. A taxpayer changing its method of accounting in accordance with this section must follow the automatic change in accounting method provisions of Rev. Proc. 98-60 (see § 601.601(d)(2) of this chapter) except, for purposes of this paragraph (a), the scope limitations in section 4.02 of Rev. Proc. 98-60 are not applicable. Taxpayers changing their method of accounting in accordance with this section must do so for all of their section 467 rental

agreements described in paragraph (b) of this section.

(b) *Agreements to which automatic consent applies.* A section 467 rental agreement is described in this paragraph (b) if—

(1) The property subject to the section 467 rental agreement is financed with an "exempt facility bond" within the meaning of section 142;

(2) The facility subject to the section 467 rental agreement is described in section 142(a)(1), (2), (3), or (12);

(3) The section 467 rental agreement does not include a specific allocation of fixed rent within the meaning of § 1.467-1(c)(2)(ii)(A)(2); and

(4) The section 467 rental agreement was entered into on or before May 18, 1999.

§ 1.467-9 Effective dates and automatic method changes for certain agreements.

(a) *In general.* Sections 1.467-1 through 1.467-7 are applicable for—

(1) Disqualified leasebacks and long-term agreements entered into after June 3, 1996; and

(2) Rental agreements not described in paragraph (a)(1) of this section that are entered into after May 18, 1999.

(b) *Automatic consent for certain rental agreements.* Section 1.467-8 applies only to rental agreements described in § 1.467-8.

(c) *Application of regulation project IA-292-84 to certain leasebacks and*

long-term agreements. In the case of any leaseback or long-term agreement (other than a disqualified leaseback or long-term agreement) entered into after June 3, 1996, and on or before May 18, 1999, a taxpayer may choose to apply the provisions of regulation project IA-292-84 (1996-2 C.B. 462)(see § 601.601(d)(2) of this chapter).

(d) *Entered into.* For purposes of this section and § 1.467-8, a rental agreement is entered into on its agreement date (within the meaning of § 1.467-1(h)(1) and, if applicable, § 1.467-1(f)(1)(i)).

(e) *Change in method of accounting—*
(1) *In general.* For the first taxable year ending after May 18, 1999, a taxpayer is granted consent of the Commissioner to change its method of accounting for rental agreements described in paragraph (a)(2) of this section to comply with the provisions of §§ 1.467-1 through 1.467-7.

(2) *Application of regulation project IA-292-84.* For the first taxable year ending after May 18, 1999, a taxpayer is granted consent of the Commissioner to change its method of accounting for any rental agreement described in paragraph (c) of this section to comply with the provisions of regulation project IA-292-84 (1996-2 C.B. 462) (see § 601.601(d)(2) of this chapter).

(3) *Automatic change procedures.* A taxpayer changing its method of accounting in accordance with this paragraph (e) must follow the automatic change in accounting method provisions of Rev. Proc. 98-60 (see § 601.601(d)(2) of this chapter) except, for purposes of this paragraph (e), the scope limitations in section 4.02 of Rev. Proc. 98-60 are not applicable. A method change in accordance with paragraph (e)(1) of this section is made on a cut-off basis so no adjustment under section 481(a) is required.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Approved: May 5, 1999.

Donald C. Lubick,

Assistant Secretary of the Treasury.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 009-0137a; FRL-6337-8]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, Six California Air Pollution Control Districts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action on revisions to the California State Implementation Plan. The revisions concern rules from the following: Kern County Air Pollution Control District (KCAPCD), Lake County Air Quality Management District (LCAQMD), Modoc County Air Pollution Control District (MCAPCD), Northern Sierra Air Quality Management District (NSAQMD), San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD), and Ventura County Air Pollution Control District (VCAPCD). The rules control particulate matter (PM) emissions from open burning, orchard heaters, fuel burning equipment, or processes identified by a weight rate throughput. This approval action will incorporate these rules into the federally-approved SIP. The intended effect of approving these rules is to regulate emissions of PM in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA). Thus, EPA is finalizing the approval of these rules into the California SIP under provisions of the CAA regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards, and plan requirements for attainment and nonattainment areas.

DATES: This rule is effective on July 19, 1999 without further notice, unless EPA receives relevant adverse comments by June 17, 1999. If EPA receives such comments, then it will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Comments must be submitted to Andrew Steckel at the Region IX office listed below. Copies of the rules and EPA's evaluation report for the rules are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rules are available for inspection at the following locations:

Rulemaking Office (AIR-4), Air Division, U.S. Environmental Protection Agency,

Region IX, 75 Hawthorne Street, San Francisco, CA 94105

Environmental Protection Agency, Air Docket (6102), 401 "M" Street, S.W., Washington, D.C. 20460

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 95812.

Kern County Air Pollution Control District, 2700 "M" Street, Suite 290, Bakersfield, CA 93301.

Lake County Air Quality Management District, 883 Lakeport Boulevard, Lakeport, CA 95453.

Modoc County Air Pollution Control District, 202 West 4th Street, Alturas, CA 96101.

Northern Sierra Air Quality Management District, 540 Searles Avenue, Nevada City, CA 95959.

San Joaquin Valley Unified Air Pollution Control District, 1990 East Gettysburg Street, Fresno, CA 93726.

Ventura County Air Pollution Control District, 702 County Square Drive, Ventura, CA 93003.

FOR FURTHER INFORMATION CONTACT: Al Petersen, Rulemaking Office, (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744-1135.

SUPPLEMENTARY INFORMATION:

I. Applicability

The rules being approved into the California SIP are listed below with the date they were adopted or amended by the Districts and the date they were submitted to EPA by the California Air Resources Board: KCAPCD Rule 409, Fuel Burning Equipment (as amended on May 7, 1998, submitted June 23, 1998); LCAQMD Section (Rule) 248.5, Prescribed Burning (Definition) (as adopted on December 6, 1988, submitted February 7, 1989); LCAQMD Section (Rule) 270, Wildland Vegetation Management Burning (Definition) (as adopted on December 6, 1988, submitted February 7, 1989); LCAQMD Section (Rule) 640, (Permit Exemptions) (as amended on July 15, 1997, submitted March 10, 1998); LCAQMD Section (Rule) 1002, (Agencies Authorized to Issue Burn Permits) (as amended on March 19, 1996, submitted May 18, 1998); Lake County Section (Rule) 1010, (No-Burn Day) (as adopted on June 13, 1989, submitted March 26, 1990); LCAQMD Section (Rule) 1350, Burning of Standing Tule (as adopted on October 15, 1996, submitted March 10, 1998); MCAPCD Rule 4.11, Orchard Heaters (as adopted on January 3, 1989, submitted December 31, 1990); NSAQMD Rule 211, Process Weight per Hour (as adopted on September 11, 1991, submitted October 28, 1996); SJVUAPCD Rule 4301, Fuel Burning Equipment (as amended on December 17, 1992, submitted September 28,

1994); and VCAPCD Rule 56, Open Fires (as amended on March 29, 1994, submitted May 24, 1994).

II. Background

On March 3, 1978, EPA promulgated a list of total suspended particulate (TSP) nonattainment areas under the provisions of the 1977 Clean Air Act, that included the Ventura County (Southern Part) and the San Joaquin Valley Air Basin (43 FR 8964; 40 CFR 81.305). On July 1, 1987 (52 FR 24672) EPA replaced the TSP standards with new PM standards applying only to PM up to 10 microns in diameter (PM-10).¹ On November 15, 1990, amendments to the 1977 CAA were enacted (Pub. L. 101-549, 104 Stat. 2399, codified at 42 U.S.C. 7401-7671q). On the date of enactment of the 1990 CAA Amendments, PM-10 areas meeting the qualifications of section 107(d)(4)(B) of the Act were designated nonattainment by operation of law and classified as moderate or serious pursuant to section 188(a). Nevada County, Plumas County, and Sierra County (which now comprise NSAQMD), Lake County, Modoc County, and Ventura County were not among the areas designated nonattainment. The present KCAPCD includes an area never designated nonattainment for PM-10 and a part of Searles Valley, which was designated moderate nonattainment for PM-10. On February 8, 1993, EPA classified four nonattainment areas as serious nonattainment, including the San Joaquin Valley Planning Area, which now comprises the SJVUAPCD.

Section 189(a) of the CAA requires moderate and above PM-10 nonattainment areas to adopt reasonably available control measures (RACM), including reasonably available control technology (RACT) for stationary sources of PM-10. Section 189(b) of the CAA requires serious nonattainment areas to adopt best available control measures (BACM) for significant sources of PM-10, including best available control technology (BACT). Therefore, KCAPCD and SJVUAPCD must meet RACM. SJVUAPCD must also adopt BACM. However, EPA is deferring decision on the specific BACM requirements until EPA acts on SJVUAPCD's BACM plan at a later date.

In response to section 110(a) and Part D of the Act, the State of California submitted many PM-10 rules for

incorporation into the California SIP, including the rules being acted on in this document. This document addresses EPA's direct-final action for the following:

KCAPCD Rule 409, Fuel Burning Equipment, was amended May 7, 1998, submitted by the State of California for incorporation into the SIP on June 23, 1998, and found to be complete on August 24, 1998, pursuant to EPA's completeness criteria that are set forth in 40 CFR Part 51 Appendix V² and is being finalized for approval into the SIP.

LCAQMD Sections (Rules) 248.5, 270, 640, 1010, and 1350 were adopted December 6, 1988, December 6, 1988, July 15, 1997, June 13, 1989, and October 15, 1996, respectively; submitted by the State of California for incorporation into the SIP on February 7, 1989, February 7, 1989, March 10, 1998, March 26, 1990, and March 10, 1998, respectively; and found to be complete on May 5, 1989, May 5, 1989, May 21, 1998, June 20, 1990, and May 21, 1998, respectively.

LCAQMD Section (Rule) 1002 was amended March 19, 1996, submitted May 18, 1998, and found to be complete July 17, 1998.

MCAPCD Rule 4.11, Orchard Heaters, was adopted January 3, 1989, submitted by the State of California for incorporation into the SIP on December 31, 1990, and found to be complete on February 28, 1991.

NSAQMD Rule 211, Process Weight per Hour, was adopted September 11, 1991, submitted by the State on October 28, 1996, and found to be complete on December 19, 1996.

SJVUAPCD Rule 4301, Fuel Burning Equipment, was amended December 17, 1992, submitted by the State of California for incorporation into the SIP on September 28, 1994, and found to be complete on October 21, 1994.

VCAPCD Rule 56, Open Fires was amended March 29, 1994, submitted by the State of California for incorporation into the SIP on May 24, 1994, and found to be complete on July 14, 1994.

PM emissions can harm human health and the environment. These rules were adopted as part of KCAPCD, LCAQMD, MCAPCD, NSAQMD, SJVUAPCD, and VCAPCD efforts to maintain the National Ambient Air Quality Standard (NAAQS) for TSP/PM-10. The following is EPA's evaluation and final action for these rules.

III. EPA Evaluation and Action

In determining the approvability of a PM-10 rule, EPA must evaluate the rule for consistency with the requirements of the CAA and EPA regulations, as found in section 110 and part D of the CAA and 40 CFR part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans). EPA must also ensure that rules are enforceable and strengthen or maintain the SIP's control strategy.

The statutory provisions relating to RACM/RACT and BACM/BACT are discussed in EPA's "General Preamble", which give the Agency's preliminary views on how EPA intends to act on SIPs submitted under Title I of the CAA. See 57 FR 13498 (April 16, 1992), 57 FR 18070 (April 28, 1992) and 59 FR 41998 (August 16, 1994). In this rulemaking action, EPA is applying these policies to this submittal, taking into consideration the specific factual issues presented.

EPA previously reviewed rules from KCAPCD, LCAQMD, MCAPCD, NSAQMD, SJVUAPCD, and VCAPCD and incorporated them into the federally-approved SIP pursuant to section 110(k)(3) of the CAA.

On September 22, 1972 and May 3, 1984, respectively, EPA approved into the SIP versions of KCAPCD Rule 407.2, Fuel Burning Equipment—Combustion Contaminants, and Rule 409, Fuel Burning Equipment—Desert Basin. Submitted Rule 409, Fuel Burning Equipment, combines these two rules and is equally as stringent. This rule regulates particulate and other emissions from fuel burning equipment. EPA has determined that submitted Rule 409 meets the requirements of RACM.

On May 18, 1981, EPA approved into the Nevada County (now part of the unified NSAQMD) SIP Rule 211, Process Weight per Hour, the general prohibition plus exceptions in paragraphs A.6 and A.7, while disapproving the exceptions in paragraphs A.1 through A.5. Paragraphs A.1 through A.5 exceptions give specific emission limits to the following:

- Portland Cement Kilns—0.30 pounds per ton dry feed.
- Portland Cement Clinker Coolers—0.10 pounds per ton dry feed.
- Sewage Sludge Incinerators—1.30 pounds per ton dry sludge input.
- Rotary Lime Kilns—0.30 pounds per ton limestone feed.
- Lime Hydrators—0.15 pounds per ton lime feed.

There is currently no version of NSAQMD Rule 211 in Plumas County or Sierra County in the SIP. Submitted NSAQMD Rule 211, Process Weight per

¹ On July 18, 1997 EPA promulgated revised and new standards for PM-10 and PM-2.5 (62 FR 38651). EPA has not yet established specific plan and control requirements for the revised and new standards. This action is part of California's efforts to achieve compliance with the 1987 PM-10 standards.

² EPA adopted the completeness criteria on February 16, 1990 (55 FR 5830) and, pursuant to section 110(k)(1)(A) of the CAA, revised the criteria on August 26, 1991 (56 FR 42216).

Hour, which contains the general prohibition plus paragraphs A.1 through A.6., replaces the Nevada County SIP-approved rule. The previously disapproved paragraphs A.1 through A.5 are being approved in this action, because this is an attainment area and all of the exceptions are at least as stringent as New Source Performance Standards, and EPA concludes that they will not interfere with attainment or any other provision of the CAA.

There is currently no version of LCAQMD Section (Rule) 248.5, Prescribed Burning (Definition), and LCAQMD Section (Rule) 270, Wildland Vegetation Management Burning (Definition), in the SIP. Section (Rule) 248.5 defines Prescribed Burning. Section (Rule) 270 defines Wildland Vegetation Management Burning.

There is currently no version of LCAQMD Section (Rule) 640, (Permit Exemptions) in the SIP. This is a new rule (a previous version was not SIP-approved) that exempts certain types of burning from the requirement to obtain a burn permit.

On August 4, 1978, EPA approved into the SIP a version of LCAQMD Section (Rule) 1002, (Agencies Authorized to Issue Permits). Submitted Section (Rule) 1002, replaces the SIP-approved rule and includes the following significant changes from the current SIP:

- U.S. Forest Service is deleted as an agency authorized to issue burn permits.
- The specific California Division of Forestry and local fire protection districts are listed by name.

There is currently no version of LCAQMD Section (Rule) 1010, (No-Burn Day) in the SIP. This is a new rule that states that the Air Pollution Control Officer shall designate and provide notice of No-Burn Days, in order to protect ambient air quality.

There is currently no version of LCAQMD Section (Rule) 1350, Burning of Standing Tule, in the SIP. This is a new rule that regulates the burning of standing tule and requires a burn permit.

There is currently no version of MCAPCD Rule 4.11, Orchard Heaters, in the SIP. The submitted rule includes the following provisions:

- Restricts the use of orchard heaters to those approved by the California Air Resources Board.
- Limits the emissions to not more than one gram per minute of unconsumed solid carbonaceous material.

On various dates, EPA approved into the SIP versions of Fuel Burning Equipment rules for the eight counties that now comprise the SJVUAPCD.

Submitted Rule 4301, Fuel Burning Equipment, replaces these rules and includes no significant changes from the SIP versions from the eight counties. Rule 4301 is equally as stringent as similar rules in other districts. EPA has determined that submitted Rule 4301 meets the requirements of RACM.

On August 6, 1990, EPA approved into the SIP a version of VCAPCD Rule 56, Open Fires. Submitted VCAPCD Rule 56, Open Fires, replaces this rule and includes the following significant changes from the current SIP:

- Burning is prohibited on Ban Days, which have been redefined as days when the ambient ozone concentration is or is predicted to exceed the California ozone standard of 0.09 ppm by volume.

- Persons who burn agricultural waste are now required to notify the District both before and after burning occurs.

EPA has evaluated the submitted rules and has determined that they are consistent with the CAA, EPA regulations, and EPA policy. Therefore, the following rules are being approved under section 110(k)(3) of the CAA as meeting the requirements of section 110(a) and part D:

- KCAPCD Rule 409, Fuel Burning Equipment (submitted June 23, 1998).
- LCAQMD Section (Rule) 248.5, Prescribed Burning (Definition) (submitted February 7, 1989).
- LCAQMD Section (Rule) 270, Wildland Vegetation Management Burning (Definition) (submitted February 7, 1989).
- LCAQMD Section (Rule) 640, (Permit Exemptions) (submitted March 10, 1998).
- LCAQMD Section (Rule) 1002, (Agencies Authorized to Issue Permits) (submitted May 18, 1998).
- LCAQMD Section (Rule) 1010, (No-Burn Day) (submitted March 26, 1990).
- LCAQMD Section (Rule) 1350, Burning of Standing Tule (submitted March 10, 1998).
- MCAPCD Rule 4.11, Orchard Heaters (submitted December 31, 1990).
- NSAQMD Rule 211, Process Weight per Hour (submitted October 28, 1996).
- SJVUAPCD Rule 4301, Fuel Burning Equipment (submitted September 28, 1994).
- VCAPCD Rule 56, Open Fires (submitted May 24, 1994).

A more detailed evaluation can be found in EPA's evaluation reports for these rules.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed

rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed. This rule will be effective July 19, 1999 without further notice unless the Agency receives relevant adverse comments by June 17, 1999.

If the EPA receives such comments, then EPA will publish a timely withdrawal informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this rule. Any parties interested in commenting on this rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on July 19, 1999 and no further action will be taken on the proposed rule.

IV. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, Regulatory Planning and Review.

B. Executive Order 12875

Under Executive Order 12875, Enhancing the Intergovernmental Partnership, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates." Today's rule does not create a mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of

section 1(a) of E.O. 12875 do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal

governments, or to the private sector, result from this action.

G. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major" rule as defined by 5 U.S.C. 804(2).

H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 19, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Particulate matter.

Note: Incorporation by reference of the State Implementation Plan for the State of California was approved by the Director of the Federal Register on July 1, 1982.

Dated: April 9, 1999.

David P. Howekamp,

Acting Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

2. Section 52.220 is amended by adding paragraphs (c)(177)(i)(F),

(179)(i)(F), (182)(i)(F)(2), (197)(i)(D)(2), (199)(i)(D)(4), (246)(i)(A)(2), (254)(i)(J), (255)(i)(D), and (256)(i)(C)(2) to read as follows:

§ 52.220 Identification of plan.

- * * * * *
(c) * * *
(177) * * *
(i) * * *
(F) Lake County Air Quality Management District.
(I) Rules 248.5 and 270, adopted on December 6, 1988.
* * * * *
(179) * * *
(i) * * *
(F) Lake County Air Quality Management District.
(I) Rule 1010, adopted on June 13, 1989.
* * * * *
(182) * * *
(i) * * *
(F) * * *
(2) Rule 4.11, adopted on January 3, 1989.
* * * * *
(197) * * *
(i) * * *
(D) * * *
(2) Rule 56, adopted on October 22, 1968, as amended on March 29, 1994.
* * * * *
(199) * * *
(i) * * *
(D) * * *
(4) Rule 4301, adopted on May 21, 1992, as amended on December 17, 1992.
* * * * *
(246) * * *
(i) * * *
(A) * * *
(2) Rule 211, adopted on September 11, 1991.
* * * * *
(254) * * *
(i) * * *
(J) Lake County Air Quality Management District.
(I) Rule 640, as amended on July 15, 1997; and Rule 1350, adopted on October 15, 1996.
* * * * *
(255) * * *
(i) * * *
(D) Lake County Air Quality Management District.
(I) Rule 1002, as amended on March 19, 1996.
* * * * *
(256) * * *
(i) * * *
(C) * * *

(2) Rule 409, adopted on April 18, 1972, as amended on May 7, 1998.

* * * * *
[FR Doc. 99-12157 Filed 5-17-99; 8:45 am]
BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MN38-01-6971a; FRL-6339-5]

Approval and promulgation of State Implementation Plans; Minnesota

AGENCY: Environmental Protection Agency.
ACTION: Direct final rule.

SUMMARY: This action approves revisions to the Minnesota State Implementation Plan (SIP) permitting program which add new sections to Minnesota's Air Emission Permits Rule 7007 and Standards for Stationary Sources Rule 7011. The Minnesota Pollution Control Agency (MPCA) submitted these new sections to the Environmental Protection Agency (EPA) on January 12, 1995. The new permitting rules will streamline the permitting process in Minnesota and, thereby, reduce the permitting burden on both sources within the State and the MPCA. Rules 7007 and 7011 are revised, respectively, by the addition of the Registration Permit Rule and the Control Equipment Rule. In the proposed rules section of this Federal Register, EPA is proposing approval of, and soliciting comments on, these SIP revisions. If adverse comments are received on this action, EPA will withdraw this final rule and address the comments received in response to this action in a final rule on the related proposed rule. A second public comment period will not be held. Parties interested in commenting on this action should do so at this time.

DATES: This "direct final" rule will be effective July 19, 1999, unless EPA receives adverse or critical comments by June 17, 1999. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the Federal Register informing the public that the rule will not take effect.

ADDRESSES: Written comments should be sent to Robert Miller, Chief, Permits and Grants Section, Air Programs Branch (AR-18J), United Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. (It is recommended that you telephone Rachel Rineheart at (312) 886-7017 before visiting the Region 5 Office.) A copy of these SIP revisions are available

for inspection at the following location: Office of Air and Radiation (OAR) Docket and Information Center (Air Docket 6102), room M1500, United States Environmental Protection Agency, 401 M Street S.W., Washington, D.C. 20460, (202) 260-7548.

FOR FURTHER INFORMATION CONTACT: Rachel Rineheart, Permits and Grants Section (AR-18J), Air Programs Branch, Air and Radiation Division, United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-7017.

SUPPLEMENTARY INFORMATION:

I. Background

Minnesota has created two new permitting rules to the Minnesota SIP permitting program. The first rule, Registration Permit Rule, specifies certain limitations under which sources may elect to operate. If an owner or operator elects to comply with the rule, it must register with the State, and the State will issue a generic permit that requires operation in compliance with the applicable sections of the Minnesota Rules. The second addition to the Minnesota SIP permitting program is the Control Equipment Rule. This rule establishes control efficiencies for add-on pollution control equipment that can be used in determining a source's potential to emit, and requires the source to use the control equipment.

A. Registration Permit Rule

This rule establishes regulatory options for certain categories of smaller sources. MPCA has developed four categories of options under this rule. A source qualifying under one of these options will register with the State, indicating that it has accepted the limitations contained in the rule for that option. EPA is approving options A, B, and D, but is disapproving option C.

Option A. To qualify for permitting under Option A, a source must have a potential to emit less than the major source thresholds without emission control equipment or other limitations on production or operation. Qualifying owners or operators of stationary sources are only required to obtain a permit if the source is subject to one of the New Source Performance Standards (NSPS) listed below:

- 1. 40 CFR part 60, subpart Dc, Standards of Performance for Small Industrial-Commercial-Institutional Stream Generating Units.
2. 40 CFR part 60, subpart K, Standards of Performance for Storage Vessels for Petroleum Liquids for which Construction, Reconstruction or Modification Commenced

After June 11, 1973 and Prior to May 19, 1978.

3. 40 CFR part 60, subpart Ka, Standards of Performance for Storage Vessels for Petroleum Liquids for Which Construction, Reconstruction or Modification Commenced After May 19, 1978 and Prior to July 23, 1984.

4. 40 CFR part 60, subpart Kb, Standards of Performance for Volatile Organic Liquid Storage Vessels (including Petroleum Storage Vessels) for which Construction, Reconstruction or Modification Commenced after July 23, 1984.

5. 40 CFR part 60, subpart DD, Standards of Performance for Grain Elevators.

6. 40 CFR part 60, subpart EE, Standards of Performance for Surface Coating of Metal Furniture.

7. 40 CFR part 60, subpart SS, Standards of Performance for Industrial Surface Coating: Large Appliances.

8. 40 CFR part 60, subpart JJJ, Standards of Performance for Petroleum Dry Cleaners.

9. 40 CFR part 60, subpart OOO, Standards of Performance for Nonmetallic Mineral Processors.

10. 40 CFR part 60, subpart TTT, Standards of Performance for Industrial Cleaning of Plastic Parts for Business Machines.

Sources that qualify for a permit under this option must submit an application to the MPCA which describes the facility and lists the applicable NSPS, and provide a copy of the applicable portion of the NSPS.

Option B. Sources that purchase or use less than 2000 gallons per year of volatile organic compound (VOC) containing materials, and whose sole emissions are from the use of these chemicals, may apply for permitting under Option B. Assuming worst case conditions, the VOC emissions from these sources are less than 10 tons per year, which is significantly less than the major source threshold. To apply for a permit under Option B, an owner or operator must provide to MPCA a description of the facility, a copy of any NSPS that would apply with the relevant portions highlighted, a statement of whether compliance will be based on purchase or use records, and the actual or estimated gallons of VOC containing material purchased or used over the last 12 month period. The rule requires sources operating under a permit issued pursuant to this option to record each month the amount of VOC containing material purchased or used during the month, to record and calculate the 12 month rolling sum of material purchased or used, and to comply with all applicable requirements.

Option C and Basis for Disapproval. Owners or operators of sources that consist solely of indirect heating units, reciprocating internal combustion engines, and/or VOC emissions from use

of VOC-containing material may apply for permitting under this option provided that they meet certain criteria regarding operation outlined in the rule. The rule attempts to allow the maximum flexibility possible in the types and quantities of fossil fuel that may be burned at a facility, while still ensuring that emissions do not exceed major sources thresholds. Qualification for the rule is determined by a series of equations based on AP-42 emission factors that estimate emissions from each type of activity at the facility for its highest emitted pollutant. If the sum of emissions from all activities are less than 100 tons per year, then the source can qualify for permitting under this option and avoid permitting under major source programs. In a situation where a facility burns a combination of fuels with different worst case pollutants, the rule would certainly limit a facility's emissions to less than major source levels since applicability is determined on a per pollutant basis, and MPCA's method totals all worst case pollutant emissions. However, if a facility burns a single fuel or a combination of fuels that have the same worst case pollutant, this rule would allow a source to emit up to just under the 100 ton major source threshold level. Because option C fails to provide specific limitations on fuel combustion and uses a test method that lacks reliability for these purposes, EPA finds that option C does not satisfactorily restrict emissions. Therefore, EPA is disapproving option C.

Option D. Option D provides that any source with actual emissions less than or equal to 50 percent of the major source threshold qualifies for permitting under this option. In the January 25, 1995 memorandum entitled "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)," signed by John S. Seitz, Director, Office of Air Quality Planning and Standards, EPA provided a 2 year transition period for sources with actual emissions below 50 percent of the major source threshold for every consecutive 12 month period. During the transition period these sources were not required to obtain Title V permits. This 2 year transition period was extended twice, first in a memorandum dated August 27, 1996, and again in a memorandum dated July 10, 1998. The purpose of the transition periods was to provide States with adequate time to develop similar rules to limit the potential to emit of these sources.

B. Control Equipment Rule

This rule provides that the owner or operator of a stationary source which uses the control efficiencies listed in the rule to determine its potential to emit is subject to the requirements of the Control Equipment Rule found at Minnesota Rules 7011.0060-7011.0080. In other words, a facility must either comply with Minn. Rules 7011.0060-7011.0080, or it may not use the control efficiencies listed in the rule to determine its potential to emit. There are two exceptions to applicability. The first is that an owner or operator who has been issued a part 70, State or general permit issued under Minnesota Rules 7007, which specifically allows either non-use of the equipment or a different control efficiency, is not subject to the rule. The second exemption to applicability is for sources which have emissions below the major source level without the use of the control equipment. The rule contains control equipment requirements for certain devices for the control of Particulate Matter (PM) and VOC emissions. For PM, the listed control equipment are as follows: high, medium, and low efficiency centrifugal collectors; multiple cyclone without fly ash reinjection; multiple cyclone with fly ash reinjection; wet cyclone separators or cyclonic scrubbers; electrostatic precipitators; fabric filters; spray towers; venturi scrubbers; impingement plate scrubbers; and HEPA and wall filters. VOC control devices include afterburners (thermal or catalytic oxidation), and flaring or direct combustors. For each type of listed control equipment, the rule establishes a control efficiency to be used, maintenance requirements, and monitoring and recordkeeping requirements. In addition, the rule requires that anyone subject to the rule must operate the listed control equipment at all times. The rule establishes control efficiencies for both total enclosures and for systems using hoods to capture pollutants.

II. Final Determination

Based on the rationale set forth above and in EPA's Technical Support Document, EPA is approving Minnesota rules 7007.1110-7007.1120, 7007.1130, and 7011.0060-7011.0080, to be incorporated into the Minnesota SIP and that Minnesota rule 7007.1125 be disapproved.

EPA is publishing this action without prior proposal because EPA views this as a noncontroversial revision and anticipates no adverse comments. However, in a separate document in this

Federal Register publication, EPA is proposing to approve the State Plan should adverse written comments be filed. This action will be effective without further notice unless EPA receives adverse written comments by June 17, 1999. Should EPA receive such comments, it will publish a final rule informing the public that this action will not take effect. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective on July 19, 1999.

III. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.) 12866, entitled "Regulatory Planning and Review."

B. Executive Order 12875: Enhancing Intergovernmental Partnerships

Under E.O. 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the OMB a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, E.O. 12875 requires EPA to develop an effective process permitting elective officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates." This rule does not create a mandate on State, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of E.O. 12875 do not apply to this rule.

C. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under E.O. 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on these communities, unless the Federal

government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to the OMB in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, E.O. 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." This rule does not significantly or uniquely affect the communities of Indian Tribal Governments. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

D. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12066, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

E. Regulatory Flexibility

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This direct final rule will not have a significant impact on a substantial number of small entities because plan approvals under section 110(a) do not create any new requirements but simply approve requirements that the State is

already imposing. Therefore, because the Federal approval does not create any new requirements I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act (ACT) preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of a State action. The Act forbids EPA to base its actions on such grounds. *Union Electric Co., v. USEPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

G. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the

publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

H. Petitions for Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 19, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter, Volatile organic compound, Reporting and recordkeeping requirements.

Dated: April 23, 1999.

David A. Ullrich,

Acting Regional Administrator, Region 5.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart Y—Minnesota

2. Section 52.1220 is amended by adding paragraph (c)(48) to read as follows:

§ 52.1220 Identification of plan.

* * * * *

(c) * * *

(48) On January 12, 1995, Minnesota submitted revisions to its air permitting rules. The submitted revisions provide generally applicable limitations on potential to emit for certain categories of sources.

(i) *Incorporation by reference.* Submitted portions of Minnesota regulations in Chapter 7007, and 7011.0060 through 7011.0080 effective December 27, 1994.

[FR Doc. 99–12366 Filed 5–17–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–6342–5]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Deletion of Yellow Water Road Dump Superfund Site from the National Priorities List (NPL).

SUMMARY: The Environmental Protection Agency (EPA) Region 4 announces the deletion of the Yellow Water Road Dump from the National Priorities List (NPL). The NPL constitutes Appendix B of 40 CFR part 300 which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended. EPA and the Florida Department of Environmental Protection (FDEP) have determined that the Site poses no significant threat to public health or the environment and, therefore, further remedial measures pursuant to CERCLA are not appropriate.

EFFECTIVE DATE: May 18, 1999.

ADDRESSES: Comprehensive information on this Site is available through the EPA Region 4 public docket, which is available for viewing at the information repositories at the following two locations:

Record Center, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, Atlanta, Georgia 30303, Telephone No.: (404) 562–9530; Hours: 8:00 a.m. to 4:00 p.m., Monday through Friday—by appointment only.
Baldwin Town Hall, 10 U.S. 90 West, Baldwin, Florida 32234, Telephone No: (904) 266–4221.

FOR FURTHER INFORMATION CONTACT:

David Lloyd, Remedial Project Manager, U.S. Environmental Protection Agency, 61 Forsyth Street, Atlanta, Georgia 30303, (404) 562–8917.

SUPPLEMENTARY INFORMATION: The Environmental Protection Agency (EPA) Region 4 announces the deletion of the Yellow Water Road Dump Site, Duval County, Florida from the National Priorities List (NPL), Appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300. EPA identifies sites that appear to present a significant risk to

public health, welfare, or the environment and maintains the NPL as the list of these sites. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substances Superfund Response Trust Fund. As described in § 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for remedial actions in the unlikely event that conditions at the Site warrant such action. EPA published a Notice of Intent to Delete the Yellow Water Road Dump Site from the NPL on December 23, 1998 in the **Federal Register** (63 FR 71052–71054). EPA received no comments on the proposed deletion; therefore, no responsiveness summary is necessary for attachment to this Notice of Deletion. Deletion of a site from the NPL does not affect the responsible party liability or impede agency efforts to recover costs associated with response efforts.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Superfund, Water pollution control, Water supply.

Dated: April 22, 1999.

A. Stanley Meiburg,

Acting Regional Administrator, U.S. EPA, Region 4.

40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Appendix B—[Amended]

2. Table 1 of Appendix B to part 300 is amended by removing the site "Yellow Water Road Dump, Baldwin, FL".

[FR Doc. 99–12244 Filed 5–17–99; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[DA 99–745]

Limitations Waived on Payments in Settlement Agreements Among Parties in Contested Licensing Cases

AGENCY: Federal Communications Commission.

ACTION: Partial waiver of rules.

SUMMARY: This document seeks to issue a limited waiver of the Commission's rules. The rules place limitations on settlements that are reached among parties in contested cases in order to prevent "greenmail." The Bureau waives these rules for a 90-day period, effective upon publication of this document in the **Federal Register**. The Bureau waives these rules to permit parties to resolve certain contested proceedings on file at the Commission as of April 16, 1999. Parties can seek dismissal or withdrawal of pending applications, petitions, other pleadings (including finder's preference requests), and informal objections filed with the Commission without limitation on the consideration promised, paid, or received for such dismissal or withdrawal.

DATES: The partial waiver of § 1.935 (a) and (b) is effective May 18, 1999 through August 16, 1999.

FOR FURTHER INFORMATION CONTACT: Donald E. Johnson, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, at (202) 418-7240.

SUPPLEMENTARY INFORMATION: This document, Public Notice DA 99-745, released April 16, 1999 is available for inspection and copying during normal business hours in the FCC Reference Center, 445 Twelfth Street, SW, Washington DC. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW, Washington DC 20036 (202) 857-3800. The document is also available via the internet at <http://www.fcc.gov/Bureaus/Wireless/PublicNotices/1999/index.html>.

Synopsis

Introduction

In this document, the Wireless Telecommunications Bureau (Bureau) issues a limited waiver of §§ 1.935(a) and 1.935(b) of the Commission's rules. These rules place limitations on settlements that are reached among parties in contested cases in order to prevent "greenmail." The Bureau waives these rules for contested proceedings on file at the Commission as of April 16, 1999, the release date of this document, DA 99-745, to the extent specified herein, for a 90-day period, effective upon publication of this document in the **Federal Register**. The Bureau waives these rules to permit parties to resolve certain contested proceedings by seeking dismissal or withdrawal of pending applications,

petitions, other pleadings (including finder's preference requests), and informal objections filed with the Commission without limitation on the consideration promised, paid, or received for such dismissal or withdrawal.

This document also permits third parties to contribute to the settlement of certain contested proceedings without limitation on the consideration promised or paid. This document does not, however, waive the Commission's policy that prohibits settlements involving the award of licenses to persons who were not parties to the proceeding.

This 90-day waiver does not apply to any applications that are in hearing status. This document waives only the greenmail limitations on the settlement of pending matters; it does not waive any other Commission prohibitions or limitations on settlements. This document does not permit parties to "settle" mutually exclusive applications that were dismissed pursuant to the Paging Second Report and Order, *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Second Report and Order and Further Notice of Proposed Rule Making*, 62 FR 11616, released February 24, 1997. Pursuant to the *Second Report and Order*, the Commercial Wireless Division of the Wireless Telecommunications Bureau dismissed, without prejudice, all pending mutually exclusive paging applications and all pending paging applications (other than applications for nationwide and shared channels) filed after July 31, 1996. *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, DA 98-2534, Order* (Wireless Telecomm. Bur. December 14, 1998). Unless the Commission modifies these decisions on reconsideration, parties may not "settle" these applications.

This document also does not permit parties to "settle" mutually exclusive applications that were dismissed pursuant to *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, Report and Order and Second Notice of Proposed Rule Making*, 63 FR 03075, released November 3, 1997. In this order, the Commission dismissed (1) all applications for which the 60-day filing window was not completed as of the date of the *Freeze Order*, DA 95-2341 (Chief, Wireless Telecom. Bureau, released November 13, 1995); (2) all major amendments filed on or after the release of the *Freeze Order*; and (3) all

mutually exclusive applications that were not cured by an amendment-of-right filed on or before the release of the *Report and Order and Notice of Proposed Rule Making*, 61 FR 02452 released December 15, 1995. Unless the Commission modifies these decisions on reconsideration, parties may not "settle" these applications.

Parties are still required to seek Commission approval of the withdrawal or dismissal of applications, petitions, other pleadings, or informal objections but, during this 90-day period, they will not be required to certify that they have not received or will not receive consideration in excess of legitimate and prudent expenses in exchange for seeking a withdrawal or dismissal. Parties are not required to provide an itemized accounting or disclose the amount of consideration received or promised as the result of any settlement agreement.

The Bureau underscores its continuing strong support, however, for the rule limiting payments in settlement cases. We are taking this action because of the many cases currently pending before the Bureau, some of which are more than five years old. Providing for a settlement period, and a limited waiver of the "greenmail" rules will facilitate the resolution of these cases and serve the public interest by removing uncertainty that surrounds unresolved, pending applications and licensing matters. In addition, a limited settlement window will allow parties to resolve disputes where the cost and delay of protracted litigation will further hamper the provision of wireless service to the public. It does not appear that a limited, one-time waiver of the rules imposed on settlement agreements would either reward improper speculation or encourage the filing of abusive pleadings in the future.

The parties to any settlement agreement must receive Commission approval of the settlement before the settlement can take effect. The parties must file a request for approval of the settlement agreement no later than 90 days after publication of this document in the **Federal Register**. Each request for approval of a settlement agreement must contain a copy of all written agreements related to the settlement. All such settlement agreements must be properly executed, contain all supporting documentation, and demonstrate that the settlement constitutes a complete resolution of the case. Parties can redact the amount of consideration promised, paid, or received.

In addition, the first page of each request for approval of a settlement agreement must contain the following

information: (1) a caption at the top of the page stating the following: "Settlement Request Pursuant to DA 99-745;" (2) a list of the parties to the contested proceeding for which settlement is being proposed; (3) a statement indicating the radio service(s) to which the settlement relates; (4) a list of all the FCC file numbers related to the settlement; and (5) a list of all the station call signs related to the settlement. Each request for approval of a settlement agreement also must include either a list of all applications and pleadings that were filed in the contested case or copies of the applications and pleadings. Further, all requests for approval of a settlement agreement must include a brief summary of the contested case that is being settled. Finally, if a settlement agreement concerns a contested case which requires a waiver, the parties must include a request for a waiver at the time of filing.

No settlement agreement will take effect until the Bureau releases a public notice approving the proposed settlement. The Bureau reserves the right to deny a request for approval of a settlement, if we find that a settlement in a particular case would not serve the public interest. Notwithstanding this 90-day waiver, the Commission will continue to take action on pending cases. Accordingly, parties are encouraged to reach settlements and file requests for approval of settlement agreements as expeditiously as possible.

No later than 90 days following publication of this document in the **Federal Register**, an original and four copies of all proposed settlement agreements must be filed with the Commission's Secretary, Magalie Roman Salas, 445 Twelfth Street, SW, TW-A325, Washington, DC 20554, in accordance with section 1.51(c) of the Commission's rules. In addition, one copy of each pleading should be delivered to (1) Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 Twelfth Street, SW 4-A207, Washington, DC 20554; and (2) Public Reference Room, Federal Communications Commission, 445 Twelfth Street, SW, Washington, DC 20554.

Federal Communications Commission.

Dianne J. Cornell,

Associate Chief, Wireless Telecommunications Bureau.

[FR Doc. 99-12451 Filed 5-17-99; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 80

[PR Docket No. 92-257; FCC 99-83]

Maritime Communications

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: The Commission has denied reconsideration of and corrected portions of the final rules adopted in the *Third Report and Order and Memorandum Opinion and Order* (Third Report and Order) in this proceeding. It clarifies the respective regulatory statuses of services that were and were not addressed in the *Third Report and Order*, deletes a cross-reference to a rule that was removed in the *Third Report and Order*, and clarifies the co-channel interference protection standards for VHF public coast geographic licensees established in the *Third Report and Order*.

DATES: Effective June 17, 1999.

FOR FURTHER INFORMATION CONTACT: Scot Stone of the Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, at (202) 418-0680 or via E-mail to "sstone@fcc.gov". TTY: (202) 418-7233.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Memorandum Opinion and Order*, PR Docket No. 92-257, FCC 99-83, adopted April 26, 1999, and released May 3, 1999. The complete text may be purchased from the Commission's copy contractor, International Transcription Services, 1231 20th Street, N.W., Washington, D.C. 20036, telephone (202) 857-3800, facsimile (202) 857-3805. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by contacting Martha Contee at (202) 418-0260, TTY (202) 418-2555, or at mcontee@fcc.gov. The full text of the *Memorandum Opinion and Order* can also be downloaded at: <http://www.fcc.gov/Bureaus/Wireless/Orders/1999/fcc9983.txt> or <http://www.fcc.gov/Bureaus/Wireless/Orders/1999/fcc9983.wp>

Summary of the Memorandum Opinion and Order

1. The Commission initiated the instant proceeding to update the Maritime Service rules to promote the use of new, spectrally efficient radio communications techniques. In the *Third Report and Order* (63 FR 40059,

July 27, 1998), the Commission adopted rules to simplify the license process for VHF public coast stations. Fred Daniel d/b/a Orion Telecom petitioned for reconsideration of those rules, contending that the 12 dB co-channel interference protection standard was insufficient to protect automated coastal stations, the development of which will be facilitated by the rule changes adopted in the *Third Report and Order*. The Commission finds, however, that the standard is sufficient, and that there is no reason to adopt different standards for automated and manually-operated stations.

2. In addition, on its own motion, the Commission amends the rules to conform the final rules adopted in the *Third Report and Order* to the text of the *Third Report and Order*, and corrects the Final Regulatory Flexibility Analysis.

Revised Final Regulatory Flexibility Analysis

3. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Second Further Notice of Proposed Rule Making* (62 FR 37533, July 14, 1997) in this proceeding (*Second Further Notice*). The Commission sought written public comment on the proposals in the *Second Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

4. *Need for, and Objectives of, the Third Report and Order.* Our objective is to simplify our licensing process for VHF public coast stations. Specifically, this action will: (1) convert licensing of VHF public coast station spectrum from site-by-site licensing to geographic area licensing, (2) simplify and streamline the VHF public coast spectrum licensing procedures and rules, (3) increase licensee flexibility to provide communication services that are responsive to dynamic market demands, and (4) introduce market-based forces into the Maritime Services by using competitive bidding procedures (auctions) to resolve mutually exclusive applications for public coast spectrum. We find that these actions will increase the number and types of communications services available to the maritime community and improve the safety of life and property at sea, and that the potential benefits to the maritime community exceed any negative effects that may result from the promulgation of rules for this purpose. Thus, we conclude that the public interest is served by amending our rules as described above.

5. *Summary of Significant Issues Raised by Public Comments in Response to the IRFA.* No comments were submitted in response to the IRFA. In general comments on the *Second Further Notice*, however, some small business commenters raised issues that might affect small business entities. In particular, some small business commenters argued that geographic licensing should be used only in certain areas; or that incumbent licensees be permitted to expand their systems before any auctions are held; or that license areas should be small enough to permit smaller licensees to participate in auctions, so that small business do not have to bid for territory far exceeding their operating needs. The Commission carefully considered each of these comments in reaching the decision set forth herein.

6. *Description and Estimate of the Number of Small Entities to Which Rules Will Apply.* The rules adopted herein will apply to licensees using public coast spectrum. The Commission has not developed a definition of the term "small entity" specifically applicable to public coast station licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration rules applicable to radiotelephone service providers. This definition provides that a small entity is any entity employing less than 1,500 persons. See 13 CFR 121.201, Standard Industrial Classification (SIC) Code 4812. Since the size data provided by the Small Business Administration does not enable us to make a meaningful estimate of the number of current or prospective public coast station licensees which are small businesses, and no commenters responded to our request for information regarding the number of small entities that use or are likely to use public coast spectrum, we used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. There are over 100 public coast station licensees. Based on the proposals contained herein, it is unlikely that more than 50 licensees will be authorized in the future. Therefore, for purposes of our evaluations and conclusions in this FRFA, we estimate that there are approximately 150 public coast station licensees which are small businesses, as

that term is defined by the Small Business Administration.

7. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* All small businesses that choose to participate in the competitive bidding for these services will be required to demonstrate that they meet the criteria set forth to qualify as small businesses, as required under 47 CFR Part 1, Subpart Q. Any small business applicant wishing to avail itself of small business provisions will need to make the general financial disclosures necessary to establish that the business is in fact small. Prior to auction each small business applicant will be required to submit an FCC Form 175, OMB Clearance Number 3060-0600. The estimated time for filling out an FCC Form 175 is 45 minutes. In addition to filing an FCC Form 175, each applicant will have to submit information regarding the ownership of the applicant, any joint venture arrangements or bidding consortia that the applicant has entered into, and financial information demonstrating that a business wishing to qualify for bidding credits is a small business. Applicants that do not have audited financial statements available will be permitted to certify to the validity of their financial showings. While many small businesses have chosen to employ attorneys prior to filing an application to participate in an auction, the rules are intended to enable a small business working with the information in a bidder information package to file an application on its own. When an applicant wins a license, it will be required to submit an FCC Form 601, which will require technical information regarding the applicant's proposals for providing service. This application will require information provided by an engineer who will have knowledge of the system's design.

8. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* The Commission in this proceeding has considered comments on ways to implement broad changes to the Maritime Services rules. In doing so, the Commission has adopted alternatives which minimize burdens placed on small entities. First, it has decided to establish a presumption that regional licensees are telecommunications carriers, avoiding the need for small telecommunications to provide detailed information about their operations. Also, it has exempted by rule from the Channel 16 safety watch requirement public coast stations whose areas are served by government stations, replacing the prior requirement

that such coast stations individually request an exemption. In addition, the Commission has eased the construction requirements for VHF public coast stations.

9. The Commission considered and rejected several significant alternatives. It rejected the alternative of licensing all VHF public coast spectrum by Coast Guard District. Instead, it will license such spectrum in areas removed from major waterways by inland VHF Public Coast Station Area (VPCs), identical to Economic Areas (EAs), allowing small entities there to participate in the auction without bidding for territory far exceeding their operating needs. The Commission rejected the alternative of delaying the auctions for the inland VPCs by holding frequencies open for public safety applications. Instead, the Commission designated public safety channels in advance. The Commission rejected the alternative of requiring each geographic area licensee to provide detailed information about the services it will offer, so the Commission could determine whether the licensee is a telecommunications carrier. Instead, the Commission established a rebuttable presumption that geographic area licensees are telecommunications carriers, so only those seeking to avoid that classification need submit such information.

10. The Commission will send a copy of the *Third Report and Order and Memorandum Opinion and Order* (63 FR 40059, July 27, 1998), including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the *Third Report and Order and Memorandum Opinion and Order* to the Chief Counsel for Advocacy of the Small Business. A copy of the *Third Report and Order and Memorandum Opinion and Order* and FRFA (or summaries thereof) will be published in the **Federal Register**. See 5 U.S.C. 604(b).

List of Subjects

47 CFR Part 20

Communications common carriers, Radio, Reporting and recordkeeping requirements.

47 CFR Part 80

Communications equipment, Radio, Vessels.

Federal Communications Commission.

Magalie Roman Salas,
Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 20 and 80 as follows:

PART 20—COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for part 20 continues to read as follows:

Authority: 47 U.S.C. 154, 160, 251–254, 303, and 332 unless otherwise noted.

2. § 20.9 is amended by revising paragraph (b) introductory text and (b)(1) to read as follows:

§ 20.9 Commercial mobile radio service.
* * * * *

(b) Licensees of a Personal Communications Service or applicants for a Personal Communications Service license, and VHF Public Coast Station geographic area licensees or applicants, proposing to use any Personal Communications Service or VHF Public Coast Station spectrum to offer service on a private mobile radio service basis must overcome the presumption that Personal Communications Service and VHF Public Coast Stations are commercial mobile radio services.

(1) The applicant or licensee (who must file an application to modify its authorization) seeking authority to dedicate a portion of the spectrum for private mobile radio service, must include a certification that it will offer Personal Communications Service or VHF Public Coast Station service on a private mobile radio service basis. The certification must include a description of the proposed service sufficient to demonstrate that it is not within the definition of commercial mobile radio service in § 20.3. Any application requesting to use any Personal Communications Service or VHF Public Coast Station spectrum to offer service on a private mobile radio service basis will be placed on public notice by the Commission.

* * * * *

PART 80—STATIONS IN THE MARITIME SERVICES

3. The authority citation for part 80 continues to read as follows:

Authority: Secs. 4, 303, 307(e), 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, 307(e), 309, and 332, unless otherwise noted. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–155, 301–609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

4. § 80.371 is amended by revising the table in paragraph (c)(1)(i) to read as follows:

§ 80.371 Public correspondence frequencies.

* * * * *
(c) * * *
(1)(i) * * *

WORKING CARRIER FREQUENCY PAIRS IN THE 156–162 MHz BAND¹

Channel designator	Carrier frequency (MHz)	
	Ship transmit	Coast transmit
24	157.200	161.800
84	157.225	161.825
25	157.250	161.850
85 ²	157.275	161.875
26	157.300	161.900
86	157.325	161.925
27	157.350	161.950
87	157.375	161.975
28	157.400	162.000
88 ³	157.425	162.025

¹For special assignment of frequencies in this band in certain areas of Washington State, the Great Lakes and the east coast of the United States pursuant to arrangements between the United States and Canada, see subpart B of this part.

²The frequency pair 157.275/161.875 MHz is available on a primary basis to ship and public coast stations. In Alaska it is also available on a secondary basis to private mobile repeater stations.

³Within 120 km (75 miles) of the United States/Canada border, in the area of the Puget Sound and the Strait of Juan de Fuca and its approaches, the frequency 157.425 MHz is available for use by ship stations for public correspondence communications only. One hundred twenty kilometers (75 miles) from the United States/Canada border 157.425 MHz is available for intership and commercial communications. Outside the Puget Sound area and its approaches and the Great Lakes, 157.425 MHz is available for communications between commercial fishing vessels and associated aircraft while engaged in commercial fishing activities.

* * * * *

5. Revise § 80.751 to read as follows:

§ 80.751 Scope.

This subpart specifies receiver antenna terminal requirements in terms of power, and relates the power available at the receiver antenna terminals to transmitter power and antenna height and gain. It also sets forth the co-channel interference protection that VHF public coast station geographic area licensees must provide to incumbents and to other VHF public coast station geographic area licensees.

6. Add new paragraph (c) to § 80.773 to read as follows:

§ 80.773 Co-channel interference protection.

* * * * *

(c) VHF public coast station geographic area licensees are prohibited from exceeding a field strength of +5 dBu (decibels referenced to 1 microvolt per meter) at their service area boundaries, unless all the affected VHF public coast station geographic area licensees agree to the higher field strength.

[FR Doc. 99–12411 Filed 5–17–99; 8:45 am]
BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 24

[WT Docket No. 97–82; FCC 99–66]

Installment Payment Financing for Personal Communications Services (PCS) Licenses

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission denies petitions for reconsideration of the *Order on Reconsideration of the Second Report and Order* and amends the Commission's rules to apply construction requirements for 10 MHz licensees to licensees of 15 MHz blocks resulting from the disaggregation restructuring option available to certain C block Personal Communications Services ("PCS") licensees. The Commission also considers and denies requests for clarification and/or waiver of the cross default provisions in F block notes.

EFFECTIVE DATE: July 19, 1999.

FOR FURTHER INFORMATION CONTACT: Jill Pender of the Wireless Telecommunications Bureau, Auctions and Industry Analysis Division, Legal Branch, at (202) 418–1546 or email jpender@fcc.gov.

SUPPLEMENTARY INFORMATION: This document is a summary of the Commission's *Second Order on Reconsideration of the Second Report and Order*, WT Docket No. 97–82, FCC 99–66, adopted March 31, 1999, and released, April 5, 1999. The full text of this *Second Order on Reconsideration of the Second Report and Order* is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY–A257, 445 Twelfth St., S.W., Washington, D.C. 20554. The complete text may be purchased from the Commission's copy contractor, International Transcription Services, 1231 20th Street, N.W., Washington,

D.C. 20036, telephone (202) 857-3800, facsimile (202) 857-3805. The complete *Second Order on Reconsideration of the Second Report and Order* is also available on the Internet at the Commission's web site: <http://www.fcc.gov/wtb>.

Summary of Action

I. Background

1. On March 23, 1998, the Commission adopted an *Order on Reconsideration of the Second Report and Order*, 63 FR 17111, April 8, 1998 ("First Reconsideration Order") generally affirming the installment payment restructuring options for C block PCS licensees established in the *Second Report and Order and Further Notice of Proposed Rule Making*, 62 FR 55348, October 24, 1997 ("C Block Second Report and Order") (collectively "C Block Restructuring Orders"). In the *C Block Second Report and Order*, the Commission allowed elections among four options—disaggregation, amnesty, prepayment, and resumption of payments. In the *First Reconsideration Order*, the Commission modified the *C Block Second Report and Order* to: (1) eliminate the requirement that a licensee must make the same election for all of its licenses, instead allowing different elections for the different MTAs in which a licensee holds licenses; (2) apply elections made for an MTA to every Basic Trading Area (BTA) license held by the licensee in that MTA; (3) permit a combination of disaggregation and prepayment; and (4) permit payment credits for each disaggregated license for which the licensee elected to resume installment payments rather than prepay.

2. By an *Order* adopted and released on February 24, 1998, 63 FR 10153, March 2, 1998, the Commission notified licensees that elections for resumption of payments would be due 60 days after publication of the Commission's *First Reconsideration Order* in the **Federal Register**. The Wireless Telecommunications Bureau ("Bureau") announced by public notice on April 17, 1998 an election date of June 8, 1998 and a payment resumption date of July 31, 1998. See "Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees," *Public Notice*, DA 98-741 (rel. April 17, 1998).

3. During the period in which the Commission was considering the election options, two licensees filed for bankruptcy, DCR PCS, Inc., the subsidiary of Pocket Communications, Inc. ("Pocket") and GWI PCS, Inc.

("GWI"). Two weeks before the submission date for petitions for reconsideration in this matter, the U.S. Bankruptcy Court for the Northern District of Texas ("bankruptcy court") issued a bench ruling in *GWI PCS 1, Inc. v. FCC*, Adv. Pro. 397-3492 (Bankr. N.D. Tex. April 24, 1998), *appeal pending*, *United States v. GWI PCS 1, Inc., et al.*, No. 3:98cv1704-L (N.D. Tex.) ("*GWI Decision*"), allowing the GWI licensees to retain 14 C block licenses for which GWI PCS was the high bidder at the C block auction, but voiding 84.34 percent of the debt owed to the Commission for these licenses. Three other C block licensees have since filed for bankruptcy. See *In Re NextWave Personal Communications, Inc.*, 98-B21529 (ASH), Chapter 11, Adv. Pro. 98-5178A (Bankr. SDNY); *In re Urban Comm-North Carolina, Inc.*, No. 98-B10086 (Bankr. SDNY); *In re Magnacomm Wireless, LLC*, No. 98-39048T (Bankr. WD Wash). In response to the *First Reconsideration Order*, the Commission received eleven petitions for reconsideration, one set of supplemental comments, and no oppositions or replies. A number of these petitions asked that the Commission apply the *GWI Decision* to C block licensees in general. Subsequently, more than 90 percent of C block licensees filed proper elections in compliance with the *First Reconsideration Order*.

4. The Commission also received requests for rulings on the impact of its cross default policy on certain pre-existing PCS F block notes. The Commission previously concluded that it would not pursue a policy of cross default (either within or across services) where licensees default on an installment payment. See Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 63 FR 2315, January 15, 1998 ("*Part 1 Third Report and Order*"). The Commission found in the *Part 1 Third Report and Order* and in the *First Reconsideration Order* that its policy against cross defaults on installment payments would promote the goals discussed in Section 309(j) of the Communications Act by not terminating a license simply because an affiliate failed to make a payment with respect to another license. These decisions did not address the subject of cross defaults that might occur in the installment payment program as a result

of an event of default other than a failure to make installment payment. One party requests that the Commission not exercise remedies based on the cross-bankruptcy default provisions in notes that had been issued for installment payment financing of PCS F block licenses ("F block notes"), while another requests a waiver of the cross default provisions contained in the F block notes. A third party argues that certain F block note provisions are inconsistent with the Commission's cross default ruling in the *Part 1 Third Report and Order*, the *C Block Second Report and Order*, and the *First Reconsideration Order*, and further maintains that the *Part 1 Third Report and Order* requires invalidation of the provisions of any notes that the Commission may already have executed where the insolvency of a note maker or its affiliate is defined as an event of default.

II. Overview

5. In this *Second Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 99-66 ("*Second Reconsideration Order*"), the Commission reaffirms its earlier conclusion that the relief provided C block licensees in previous *C Block Restructuring Orders* will speed deployment of service to the public by easing lenders' and investors' concerns regarding regulatory uncertainty and by potentially making more capital available for investment and growth. The adjustments to the *C Block Second Report and Order* contained in the *First Reconsideration Order* provided additional flexibility to licensees without undermining the integrity of the auctions process. The petitioners have presented no arguments sufficient to require modifications to the *C Block Restructuring Orders*. Accordingly, the Commission affirms its *First Reconsideration Order*, but makes one minor amendment to the construction rules to effectuate the disaggregation option. Section 24.203(b) is amended to recognize the existence of 15 MHz blocks resulting from the *C Block Restructuring Orders*, and apply the current construction requirements for 10 MHz blocks to the 15 MHz blocks. The Commission also considers and rejects requests for clarification or waiver of cross default provisions contained in F block notes.

III. Issues Related to Bankruptcy Filings and Decisions

6. The Commission released previous *C Block Restructuring Orders* prior to the issuance of the *GWI Decision*. Some petitioners rely on the *GWI Decision* as

a basis for requesting a stay of the June 8, 1998 election and July 31, 1998 resumption of payment dates. The Commission notes that this issue is mooted by the proper filing of election notices and the resumption of payments by more than 90 percent of the C block licensees, and finds that no good cause exists for delaying elections based on actual and projected bankruptcy activity. The Commission also rejects the *GWI Decision* as a valid precedent in this matter and refuses to apply the bankruptcy court's findings to other C block licensees.

IV. First Reconsideration Order Issues Raised

7. Some petitioners claim that single license holders fail to realize the benefits afforded larger-scale licensees. They sought future auction credits for single-license holders using the amnesty option, so that such licensees would not lose the benefit of their down payments. The Commission rejects special options that would enhance the financial benefits afforded single license holders and affirms the options as articulated in the *First Reconsideration Order*. The *Second Reconsideration Order* provides the following reasons for refusing to grant the petitioners' request: (1) the Commission already has provided a variety of restructuring options so that licensees may choose the option that best suits their situation; (2) multiple licensees receiving a credit for returned licenses, unlike holders of single licenses using the amnesty option, are prohibited from rebidding on surrendered licenses; (3) holders of single licenses may use the disaggregation option and thereby receive the same proportional benefits as large-scale holders.

8. Two petitioners raise arguments concerning the validity and use of the MTA-by-MTA elections contained in the *First Reconsideration Order*. The Commission rejects any alteration to disaggregation generally and refuses to discard or change the MTA-by-MTA elections permitted in the *First Reconsideration Order*. The Commission believes that the MTA is the appropriate unit for making an election and it will not permit BTA-by-BTA elections because it would threaten the interdependency of licenses and limit the potential for aggregation of licenses within an MTA.

V. Amendment of Section 24.203(b)

9. The Commission notes that while the C Block Restructuring Orders provided a disaggregation option which will result in 15 MHz C block licenses, the current construction rules address

only 10 MHz and 30 MHz blocks. See 47 CFR 24.203(b). The *Second Reconsideration Order* amends Section 24.203(b) to apply to licensees of 15 MHz blocks resulting from the disaggregation option under the *C Block Restructuring Orders* the construction requirements for 10 MHz blocks.

VI. Requests for Ruling on Impact of Cross Default Policy on Certain Pre-Existing PCS F Block Notes

10. The Commission finds that the *Part 1 Third Report and Order* is not inconsistent with, and therefore does not invalidate, the cross default provisions contained in the F block notes. The Commission notes that the *Part I Third Report and Order* and the F block notes set forth the Commission's policy toward licensees that default under different circumstances. The *Second Reconsideration Order* affirms the policy of the *Part 1 Third Report and Order*, which states that the Commission will not pursue a policy of cross default in cases where licensees default on installment payments. The Commission cautions that this finding does not preclude the application of cross default in the very different circumstance of an affiliate's insolvency or bankruptcy. Accordingly, the Commission holds that the F block note default provisions continue to have full force and effect as to all events enumerated therein. In light of this clarification that the cross default provisions in the F block note continue to have full force and effect, the Commission will not grant requests for clarification to the contrary, nor will it permit a waiver of the cross default provisions in the F block notes.

VII. Second Supplemental Final Regulatory Flexibility Analysis

11. As required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. 604, an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking ("Notice")* in WT Docket No. 97-82. The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. A Final Regulatory Flexibility Analysis ("FRFA") was incorporated in the *C Block Second Report and Order*. A Supplemental FRFA appeared in the *First Reconsideration Order*. The Commission received 11 Petitions for Reconsideration in response to the *First Reconsideration Order*. This Second Supplemental FRFA addresses modification of the construction requirements for broadband PCS

licenses necessitated by the adoption of the *C Block Restructuring Orders*.

A. Need for, and Objectives of, New Rule

12. The *C Block Restructuring Orders* were designed to assist C block broadband personal communications services ("PCS") licensees to meet their financial obligations to the Commission while at the same time helping the Commission meet its goal of ensuring rapid provision of PCS service to the public. One of the financial restructuring options provided for in the *C Block Restructuring Orders* permitted disaggregation of a licensee's spectrum, resulting in the availability of 15 MHz C block licenses where only 10 MHz and 30 MHz blocks were available previously. The amendment of section 24.203(b) in this *Second Reconsideration Order* sets necessary construction standards for licensees of 15 MHz blocks created through the disaggregation option available under the *C Block Restructuring Orders*. This amendment applies to licensees of 15 MHz blocks the same construction requirements as apply to 10 MHz blocks. In doing so, this rule facilitates a process designed to increase effective use of the spectrum and ultimately provide licensees with the flexibility to introduce a wide variety of new and innovative telecommunications services to the public.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

13. There were no comments filed in response to the IRFA in the *C Block Second Report and Order*; however, in this proceeding we have considered the economic impact on small businesses of the modification adopted in this *Second Reconsideration Order*. See Section E of this Second Supplemental FRFA, *infra*.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

14. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act. Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field

of operation; and (3) meets any additional criteria established by the Small Business Administration ("SBA").

15. The *Second Reconsideration Order* applies to broadband PCS C and F block licensees. The Commission, with respect to broadband PCS, defines small entities to mean those having gross revenues of not more than \$40 million in each of the preceding three calendar years. This definition has been approved by the SBA. On May 6, 1996, the Commission concluded the broadband PCS block auction. A Second PCS C block auction closed on July 16, 1996. The broadband PCS D, E, and F block auction closed on Jan. 14, 1997. Ninety bidders (including the C block reauction winners, prior to any defaults by winning bidders) won 493 C block licenses and 88 bidders won 491 F block licenses. Small businesses placing high bids in the C and F block auctions were eligible for bidding credits and installment payment plans. For purposes of our evaluations and conclusion in this FRFA, we assume that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees potentially affected by this *Second Reconsideration Order*, are small entities. The disaggregation option applies only to C Block licensees, so therefore the rules changes will affect no more than 90 entities prior to any auction of returned spectrum.

D. Description of the Projected Reporting, Record-Keeping, and Other Compliance Requirements

16. The modifications adopted by the *C Block Restructuring Orders* include reporting and record-keeping requirements for licensees of newly created 15 MHz blocks to establish compliance with the construction requirement adopted for those blocks. These licensees must file maps and other supporting documents at the five and ten-year construction benchmarks.

E. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

17. As noted in the FRFA of the *C Block Second Report and Order*, the Commission analyzed the significant economic impact on small entities and considered significant alternatives. The modifications adopted on reconsideration further reduced the burden on C block licensees, which are small businesses. These steps were detailed at length in the Supplemental FRFA. The amendment adopted in the *Second Reconsideration Order* similarly

minimizes economic impact in that it applies the 10 MHz construction requirements to licensees of the newly created 15 MHz blocks. Thus, it applies the less onerous of the existing construction requirements.

F. Report to Congress

18. The Commission shall send a copy of the *Second Reconsideration Order*, including this Second Supplemental FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. See 5 USC 801(a)(1)(A). A copy of the Second Reconsideration Order and this FRFA will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

Paperwork Reduction Act

19. This *Second Reconsideration Order* contains neither a modified nor a new information collection.

List of Subjects in 47 CFR Part 24

Personal communications services.
Federal Communications Commission.
Magalie Roman Salas,
Secretary.

Rule Changes

Accordingly, Part 24 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 24—PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.203(b) is amended by revising the first sentence to read as follows:

§ 24.203 Construction requirements.

* * * * *

(b) Licensees of 10 MHz blocks and 15 MHz blocks resulting from the disaggregation option as provided in the Commission's Rules Regarding Installment payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket 97-82, 12 FCC Rcd 16,436 (1997), as modified by *Order on Reconsideration of the Second Report and Order*, WT Docket 97-82, 13 FCC Rcd 8345 (1998), must serve with a signal level sufficient to one-quarter of the population in their licensed area within five years of being licensed, or make a showing of substantial service in

their licensed area within five years of being licensed. * * *

* * * * *

[FR Doc. 99-12455 Filed 5-17-99; 8:45 am]

BILLING CODE 6712-01-U

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 99990312074-9074-01; I.D. 051299A]

Pacific Halibut Fisheries; Washington Sport Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Inseason action.

SUMMARY: NMFS announces changes to the regulations for the Area 2A sport fisheries off the south coast of Washington. This action opens the south coast closed area to halibut fishing. The purpose of this action is to allow sport fishers access to the south coast of Washington halibut quota in a season of unusually slow fishing.

DATES: Effective May 13, 1999.

ADDRESSES: Comments may be mailed to William Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way, Seattle, WA 98115.

FOR FURTHER INFORMATION CONTACT: Yvonne deReynier, 206-526-6120.

SUPPLEMENTARY INFORMATION: The Area 2A Catch Sharing Plan for Pacific halibut off Washington, Oregon, and California is implemented in the annual management measures for the Pacific halibut fisheries published on March 19, 1999 (64 FR 13519). Those regulations established the 1999 subarea quota for the south coast of Washington (Queets River, Washington to Leadbetter Point, Washington) fishery as 32,081 lb (14.6 mt). The all-depth sport fishery in this area is scheduled for 5 days per week (Sunday through Thursday), and the nearshore fishery is scheduled for 7 days per week. Early catch rate attainment for this area is significantly slower than in past years, with several charter vessels returning to dock without having caught any halibut. In 1998, charter anglers averaged 1 fish per person over the fishery's opening weekend. This year, anglers averaged .25 fish per person over the opening weekend.

Section 24 of the 1999 Pacific halibut regulations provides NMFS with the flexibility to make certain inseason management changes, provided that the action is necessary to allow allocation objectives to be met, and that the action will not result in exceeding the catch limit for the area. The structuring objective for the Washington coast subarea is to maximize the season length, while maintaining a quality fishing experience. This inseason action would open to fishing the portion of the Washington south coast subarea that is currently closed to sport fishing for halibut.

The Washington south coast closed area is a halibut "hot spot." The purpose of having a closed "hot spot" is to lengthen the season in this subarea by preventing fisher access to this area of more abundant halibut. The closed area is not maintained for conservation purposes. Given the extremely low rate of halibut landings thus far in 1999, opening the "hot spot" to fishing is not expected to shorten the season for this area over past years' season lengths. The closed area is a rectangle defined by

these four coordinates: 47°19'00" N. lat., 124°53'00" W. long.; 47°19'00" N. lat., 124°48'00" W. long.; 47°16'00" N. lat., 124°53'00" W. long.; 47°16'00" N. lat., 124°48'00" W. long.

In consultation with the Washington Department of Fish and Wildlife, the Pacific Fishery Management Council, and the International Pacific Halibut Commission, NMFS has determined that opening the Washington south coast closed area to halibut fishing meets the season structuring objective of providing a quality fishing experience without allowing the fishery to exceed the Washington south coast quota.

NMFS Action

For the reasons stated above, NMFS announces the following change to the 1999 annual management measures (64 FR 13519, March 19, 1999, as amended).

1. For the Washington south coast subarea, section 23(4)(b)(iii)(C) is removed.

Classification

This action is authorized by the regulations implementing the Catch Sharing Plan. The determination to take

these actions is based on the most recent data available. Because of the need for immediate action to allow fishers access to the Washington south coast halibut quota, and because the public had an opportunity to comment on the NMFS authority to make inseason changes to certain management measures when those measures would further the objectives of the Catch Sharing Plan, NMFS has determined that good cause exists for this document to be published without affording a prior opportunity for public comment or a 30-day delayed effectiveness period. Public comments will be received for a period of 15 days after the effectiveness of this action. This action is authorized by Section 24 of the annual management measures for Pacific halibut fisheries published on March 19, 1999 (63 FR 13519) and has been determined to be not significant for purposes of E.O. 12866.

Dated: May 13, 1999.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 99-12486 Filed 5-13-99; 4:05 pm]

BILLING CODE 3510-22-F

Proposed Rules

Federal Register

Vol. 64, No. 95

Tuesday, May 18, 1999

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 317, 318, 319, and 381

[Docket No. 97-001P]

RIN 0583-AC35

Elimination of Requirements for Partial Quality Control Programs

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is proposing to amend the meat and poultry products inspection regulations by removing the requirements pertaining to partial quality control (PQC) programs except with respect to the irradiation of poultry products. A PQC program controls a single product, operation, or part of an operation in a meat or poultry establishment. The proposal would remove the design requirements for PQC programs and the requirements for establishments to have PQC programs for certain products or processes, other than those that apply to irradiation of poultry products. For example, the proposal would remove the requirements for poultry slaughtering establishments operating under the New Line Speed (NELS) inspection system and the New Turkey Inspection System (NTIS) to have PQC programs and the requirements concerning the design, content, and Agency approval of those programs. The proposal would also remove from the thermal processing regulations the requirements for FSIS prior approval of systems and devices not specified in the regulations and all requirements concerning PQC programs. The proposal would expand the alternatives available to establishments under the thermal processing regulations for ensuring the safety of their products. This proposal is intended to provide inspected establishments with flexibility, to make the regulations more consistent with the

Pathogen Reduction (PR)/Hazard Analysis and Critical Control Points (HACCP) regulations, and to encourage establishments to adopt new technologies and methods that will improve food safety and other consumer protections.

DATES: Comments must be received on or before July 19, 1999.

ADDRESSES: Submit one original and two copies of written comments to FSIS Docket Clerk, DOCKET #97-001P, U.S. Department of Agriculture, Food Safety and Inspection Service, Room 112 Cotton Annex Building, 300 12th Street, SW., Washington, DC 20250-3700. All comments submitted in response to this proposed rule will be available for public inspection in the Docket Clerk's Office between 8:30 a.m. and 4 p.m., Monday through Friday. Those who wish to make oral comments can schedule an appointment with the person whose name appears in **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Patricia F. Stolfa, Assistant Deputy Administrator, Office of Policy, Program Development, and Evaluation, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250-3700; (202) 205-0699.

SUPPLEMENTARY INFORMATION:

Background

FSIS carries out programs designed to ensure that meat, poultry, and egg products are wholesome, not adulterated, and properly marked, labeled, and packaged. FSIS is implementing the "Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems" final rule published July 25, 1996 (61 FR 38806), to reduce the risk of foodborne illness associated with the consumption of meat and poultry products to the maximum extent possible. The Pathogen Reduction (PR)/HACCP final rule requires establishments to take appropriate and feasible measures to prevent or reduce the likelihood of physical, chemical, and microbiological hazards in the production of meat and poultry products.

FSIS is reviewing its other regulations to determine how they can be made more consistent with the PR/HACCP regulations and the regulatory approach they embody. This approach favors performance-based standards over prescriptive, command-and-control

regulations. Command-and-control requirements specify, often in great detail, how a plant is to achieve particular food safety or other regulatory objectives, while performance standards state the objectives or levels of performance to be achieved and give a plant the ability to describe how it will achieve them. Included in the Agency's review are regulations on sanitation, meat and poultry products with visible defects affecting safety or quality, and economic adulteration of meat and poultry products.

FSIS announced its regulatory review in a December 29, 1995, advance notice of proposed rulemaking (ANPR) "FSIS Agenda for Change" (60 FR 67469). The Agency said that, by eliminating unnecessary regulations and replacing command-and-control prescriptions with performance standards, inspected establishments would have greater flexibility to adopt innovations that can yield food-safety benefits. Among the regulations FSIS has identified as candidates for modification or elimination are those that delimit processing and treatment methods intended to eliminate specific food safety hazards and requirements concerning quality control programs.

FSIS has already reduced its role of approving and specifying in detail the design and operation of establishment-operated partial quality control (PQC) programs. In 1997, the Agency published a final rule that, among other things, removes the requirement for FSIS prior approval of most PQC programs (62 FR 45016, August 25, 1997). Recognizing that the establishment bears primary responsibility for the control of its own manufacturing processes, FSIS now thinks it appropriate to take the further step of eliminating PQC requirements other than for irradiation of poultry (9 CFR 381.149(b)), so that establishments will have the flexibility they need to be innovative, and consistent with HACCP and the Agency's regulatory policy. (FSIS proposed to remove requirements for quality control programs for poultry-product irradiation in its February 24, 1999, proposal on the irradiation of meat and meat products (64 FR 9809).)

Quality Control

Quality control, in general, is a planned, documented system of activities intended to ensure the

stability of processes and uniformity of products. Quality control programs and systems are based on the assumption that there is normal variation in any process, and that the process is under control if that variation is not exceeded.

In the food industry, quality control systems are used in processing operations to make sure that products from TV dinners to hotdogs will be exactly the same—will have the same content, flavor, color, texture, etc.—no matter how many thousands are made in a production run. Quality control programs can be used to maintain normal process variation within the limits prescribed in a standard, such as the 50-percent-fat limitation in a breakfast sausage. If the expected variation is exceeded, corrective action is taken to restore process stability.

Under FSIS regulations, a company may choose to place all of the processes and products in a plant under a comprehensive, or total, quality control system, or the company may choose to place only individual products or processes under quality control. A quality control program for only one process or product in a plant is known as a partial quality control (PQC) program.

Some PQC programs control product potential health and safety problems; others focus on economic or quality factors. PQC programs controlling for safety factors include those for thermally processed products, which are intended primarily to prevent toxin formation in the processed product. The programs for cooked beef products are intended to ensure that the processing of the products meets the regulatory requirements for handling, processing (time, temperature, and relative humidity), and storage to prevent pathogen formation in the products. PQC programs that control for product safety have been largely superseded by required HACCP plans.

PQC programs that control for economic or non-food-safety factors include those used to control the fat and water content of hotdogs, the number of meatballs in, or pepperoni slices on, a product, and the moisture or protein-fat-free (PFF) content of a product labeled "ham, water added." The quality control program for mechanically separated (species) (MS(S)) is intended to control bone particle size, calcium content, fat and protein content, and protein efficiency ratio (9 CFR 319.5). The programs for pressed ham and spiced ham products are intended to ensure that the products meet the PFF regulatory requirements of § 319.104.

PQC programs to control products for economic factors are intended to

prevent the marketing of products that are misbranded or that lack the quality or value that consumers expect. A plant operating under a PQC program for net weight keeps records of its checks and corrective actions to avoid lot inspection. Under PQC programs for fat and water in frankfurters, plants keep ingredient records by lot and results of laboratory tests for verification by FSIS inspectors. A plant operating a PQC program for boneless meat inspection does its own on-line inspection and keeps records. The FSIS inspector randomly selects samples of product that the plant has already inspected to ensure that the records are accurate.

Establishments are required by current regulations to have PQC programs for certain products or processes, such as the one for MS(S), just mentioned. A PQC program for on-line carcass quality control is required for an establishment operating under either the NELS or the NTIS poultry inspection system (9 CFR 381.76(c)).

PQC Programs in Slaughtering Plants

The Agency conducts verification checks on the plant-operated PQC programs required for certain inspection systems. Establishments being considered for implementation of the NELS and NTIS inspection systems (currently, about 10 per year) must meet requirements both for facilities and for PQC programs.

Interested establishments are required to obtain FSIS approval of their PQC programs before the programs can be implemented on a trial basis. Unacceptable PQC programs are returned to the establishment for correction.

Once approved, PQC programs are subject to on-site review by the Agency for six months after implementation. The establishment then submits an updated PQC program to the Agency for final review. If, at that stage, the program is found to be acceptable, full approval is granted, although the establishment remains subject to Agency verification checks. If the program is unacceptable, the trial period may be extended or approval of the program may be withdrawn.

The Agency provides guidelines to help interested establishments prepare for implementation of the NELS and NTIS inspection systems. Instructions for developing PQC programs are included in those guidelines. The Agency also offers instruction on slaughter quality control programs to Government and industry personnel at the FSIS Training Center.

Proposed Changes

FSIS is proposing to eliminate the requirement in 9 CFR 317.21(b) that establishments have, as an alternative to State or local certification of scales, PQC programs or total quality control system provisions for checking the accuracy of scales. The Agency is proposing simply to require that there be a certification of accuracy from State or local authorities or from a State-registered or -licensed scale repair firm or person. Establishments could continue to maintain scale-checking provisions in their QC programs and systems.

The Agency is proposing to remove from the meat and poultry inspection regulations the design requirements for partial quality control programs (9 CFR 318.4(d), 381.145(d)). The provisions outline what is necessary when an establishment is required to have a PQC program. Because the Agency is proposing to revoke the regulatory requirements pertaining to PQC programs, there is no need to describe what is necessary when PQC is required.

FSIS would also remove quality control requirements (9 CFR 318.7) governing the use of nitrites in bacon curing and the use of certain organic acids singly or in combination to delay the discoloration of fresh meat cuts. Such requirements are incompatible with the Agency's regulatory objectives because they specify a manner of compliance rather than simply a performance standard.

Both the nitrite and the organic acid regulations clearly state the maximum limits of use of the substances they concern. The consumer is also informed by product labeling of the presence of the substances in the products. The regulations provide clear limits and adequate consumer protections without the quality control requirements. The Agency is also proposing to improve the accuracy of the regulation by using the term "production of botulinum toxin" rather than "growth of botulinum toxin" (see 9 CFR 318.7(b)(3)(ii)). FSIS is aware that these food-safety regulations also may be regarded as inconsistent with the PR/HACCP regulations, but the Agency would prefer to address this inconsistency in a future rulemaking.

The Agency proposes to make the meat and poultry canning regulations (9 CFR 318.305 and 381.305) more consistent with the Agency's new, non-command-and-control regulatory approach by eliminating a number of prior-approval requirements. First, the requirement that the Agency prior-approve temperature-indicating devices other than mercury-in-glass

thermometers (at §§ 318.305(a)(1)(ii) and 381.305(a)(1)(ii)) would be replaced. Temperature-indicating devices, such as resistance temperature detectors, could be used and, as is the case currently, they would have to meet known standards of accuracy for such devices, but the frequency of testing for accuracy would not be prescribed.

The Agency is also proposing to remove the requirement for case-by-case evaluation and approval by FSIS of thermal processing systems not specified in the regulations. As amended, 9 CFR 318.305(f) and 381.305(f) would require that such systems be adequate to produce shelf-stable products consistently and uniformly. These requirements reflect the basic purposes of the canning regulations.

FSIS is also proposing to remove from the thermal processing regulations (9 CFR 318.307(b) and 381.307(b)) provisions concerning PQC programs and requirements for FSIS prior approval of thermal processing systems not specified in the regulations, including monitoring and recording devices not specified in the regulations. The Agency tentatively concludes that these regulations will ensure the adequacy of these systems without the requirement that the Agency is proposing to delete, which is inconsistent with the PR/HACCP regulations.

The Agency is also proposing to remove from the thermal processing regulations the requirements (in §§ 318.308 and 309 and §§ 381.308 and 309) concerning partial quality control programs to control process deviations and establishment finished product inspection procedures. The Agency tentatively finds that these requirements are unnecessary. The detailed prescriptions in these sections, which are based on HACCP principles, would remain as acceptable protections against potential microbial contamination.

Under this proposal, a thermal processing establishment would have four alternatives available to control process deviations identified in-process. The establishment could:

(1) Provide for how it will handle the deviations under a HACCP plan; or, until subject to 9 CFR part 417, (2) follow the existing regulations (§§ 318.308(d) and 381.308(d)); (3) handle the deviations under an approved total quality control system until the PR/HACCP rule becomes applicable to it; or (4) use alternative documented procedures for handling process deviations. The alternative documented procedures could be provisions of a HACCP plan, such as

corrective actions to be taken, recordkeeping, or monitoring procedures, that would be followed when process deviations occurred. They could also include partial quality control programs, developed by or for the establishment, but not subject to FSIS approval. Such food-safety-related PQC programs would, however, be superseded by or integrated with provisions of the establishment's HACCP plan when that plan is implemented.

Similarly, under this proposal, a thermal processing establishment would have four alternatives for handling finished product inspections. The finished product inspections could be handled under: (1) The existing regulations (§§ 318.309(d) and 381.309(d)); (2) a HACCP plan; (3) the provisions of an approved total quality control system, until the PR/HACCP final rule is applicable to the establishment; or (4) alternative documented procedures for handling finished product inspections. The alternative documented procedures could be PQC programs or the HACCP plan provisions.

In any case, any alternative procedures for handling process deviations or finished product inspections would have to ensure that only safe, stable product is shipped in commerce. This proposed requirement dictates that not only would the procedures have to ensure that the product is free of microorganisms of public health significance, but also that it is not adulterated by other types of microorganisms, such as "flat-sour" bacteria or other spoilage organisms. This proposed requirement is consistent with the aims of HACCP and with the statutory prohibitions against the distribution of adulterated and misbranded meat and poultry products in commerce.

The proposed amendments would make the thermal processing regulations more consistent with the PR/HACCP final rule by explicitly providing a HACCP-plan alternative to the prescriptive procedures (consistent with § 417.2(b)(3)) and by including, as an option for handling process deviations or final product inspections, alternative documented procedures that ensure that only safe and stable products are shipped in commerce. This option would provide the establishment with the flexibility to use PQC programs or other procedures that meet a regulatory public health standard.

It should be noted that, under the HACCP regulations, an establishment's HACCP plan does not have to address potential microbial hazards in thermally

processed/commercially sterile product if the establishment is following the current regulatory requirements for such product. However, the HACCP plan must address physical and chemical hazards to which the product may be subject.

Besides proposing to remove the requirements pertaining to PQC programs that control food-safety factors, which are inconsistent with PR/HACCP, FSIS is proposing to remove the requirements affecting economic or quality-related PQC programs. FSIS considers these requirements to be too prescriptive. They tend to perpetuate the command-and-control approach to food inspection and regulation. They are not in keeping with the Agency's new regulatory approach, which is oriented more toward monitoring industry compliance with performance-related objectives.

First, the Agency is proposing to remove the QC system requirements from the regulations and requirements governing the identity and composition of MS(S) product and label approval of the product (9 CFR 319.5). The MS(S) regulations specify the maximum calcium content, the minimum protein content, the protein efficiency ratio, the maximum fat content, and the maximum bone particle size for the product. The regulations also specify the elements that the QC system must contain, including a written description of the methods used by the establishment to maintain uniformity of raw materials used in manufacturing product and to control handling and processing of the raw materials and finished product. The regulations also specify the sample size and sampling frequency for food-chemistry analysis of product to determine compliance with the standards. FSIS regards these provisions as overly prescriptive and believes that, to achieve the purposes of the MS(S) regulations, it is sufficient to set the product standards for fat, protein, calcium content, and bone particle size.

The Agency is also proposing to update the provision for finished product samples to be analyzed according to methods of the Association of Official Analytical Chemists (AOAC) or methods listed in the FSIS "Chemistry Laboratory Guidebook" to reflect use of the most recent edition of the AOAC compendium. In addition, FSIS is proposing to give establishments the latitude to use validated scientific methods equivalent to, but not listed in, the AOAC and FSIS references. Under this proposed action, the establishments will have flexibility to choose the most appropriate means of ensuring that

MS(S) meets the compositional and labeling identity requirements of the regulations, but they will also have the burden of demonstrating equivalence.

The Agency is aware, however, that some may disagree with the evaluation of the MS(S) QC and analytical requirements as overly prescriptive; their comments on this matter are invited. Others may regard the incorporation by reference of the AOAC methods as unnecessary and such standards as those for fat content and protein efficiency ratio as duplicative of other regulatory requirements. Their comments are invited as well.

Second, consistent with the other changes proposed in this document, FSIS is proposing to eliminate the quality control program requirements from the protein-fat-free (PFF) percentage regulations (§§ 319.104 and 319.105) for various "finely divided" cured ham products, such as patties, chopped or pressed ham, and spiced ham. Establishments would still be required to abide by the PFF percentage limits for these products.

Finally, FSIS is proposing to remove the requirement that poultry slaughtering establishments operating under the NELS and NTIS inspection systems have PQC programs for carcass defects. If this proposed change is adopted, the establishments will have the flexibility to adopt quality control programs or other measures for ensuring the quality of their products. Removing the prior-approval aspect of these requirements will contribute to clarifying the respective roles of the inspection service and the regulated industry—a necessary task in making the requirements consistent with HACCP.

FSIS inspectors would continue to check poultry in NELS and NTIS plants for visible contamination and carcass trimming defects.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been determined to be significant, though not economically significant, and was reviewed by the Office of Management and Budget under Executive Order 12866.

FSIS is proposing to eliminate the regulatory requirements pertaining to establishment-operated PQC programs. This action would remove regulatory obstacles to innovation and command-and-control requirements inconsistent with the Agency's new regulatory approach and the objectives of the PR/HACCP regulations. In its August 25, 1997, final rule (62 FR 45016), the requirements for FSIS prior approval of

most PQC programs were eliminated. This action was taken to facilitate the transition to HACCP in official establishments producing the greatest portion of meat and poultry products consumed in the United States. FSIS is proposing to take the additional step of eliminating most requirements for establishments to have PQC programs for specific products or processes, as well as design requirements affecting most PQC programs. The only PQC program requirements this proposal would leave in place would be the requirement for QC programs for irradiated chicken. However, as mentioned previously, this requirement is being addressed in another rulemaking proceeding (64 FR 9809).

The alternatives to this proposed rulemaking that FSIS considered were, in addition to the alternative of no rulemaking, those of mandating additional in-plant controls and of mandating general requirements and standards for PQC programs.

The alternative of no rulemaking would impose no additional regulatory burdens on establishments, which would continue to have the assurance that their PQC programs meet basic design criteria. However, the Agency rejected this alternative because not changing the regulations would leave in place a prescriptive regulatory regime for process controls and PQC programs that conflict in a material way with the objectives of the PR/HACCP final rule. Under HACCP, establishments assume responsibility for building science-based, preventive process controls into the food production system to reduce or eliminate food safety hazards. This includes taking responsibility for ensuring that processes conform with sound food safety performance standards. Establishments need to be able to implement better and more innovative food-safety and other consumer-protection strategies. This includes the flexibility to design a PQC program and determine its content and implementation date.

The alternative of mandating additional in-plant controls, whether in addition to or in lieu of PQC requirements, would add regulatory assurances that processes are under control and that products are safe, wholesome, and not misbranded. However, this alternative would add prescriptive, command-and-control requirements and restrict the scope for establishment food-safety initiatives, contradicting the Agency's new regulatory approach. The additional requirements also would probably not result in food-safety improvement.

The alternative of mandating new general requirements or standards for PQC programs would differ little in its effects from the current requirements for PQC programs to have certain features and for process control under the programs to be based on generally accepted statistical principles (9 CFR 318.4(d); 381.145(d)). Even if the current requirements were condensed, they would still be inconsistent with the PR/HACCP regulations and with the Agency's new regulatory approach, establishments would continue to incur a substantial recordkeeping burden, and the Agency would have nearly the same burden as it now does of verifying establishment compliance with the requirements.

FSIS chose the option of eliminating regulatory requirements for all PQC programs except QC programs for the irradiation of poultry products. This option provides establishments with the most flexibility in implementing process control programs in a HACCP environment. FSIS's proposed rule on irradiation of meat and meat products (64 FR 9089, February 24, 1999) would eliminate the requirement for QC programs in facilities where poultry products are irradiated.

Implementation of this proposed rule would enable FSIS to redirect resources from PQC program verification to other activities for ensuring that products are not adulterated or misbranded. FSIS has considered a number of alternatives to PQC program verification, such as finished product sampling for microbiological or food chemistry analysis and market sampling. Market sampling or national surveys can be used in lieu of inspecting lots or evaluating PQC programs for fat and water content of frankfurters. An alternative to FSIS evaluation of PQC programs for basting solutions in poultry products is finished product sampling for chemical analysis.

In-plant sampling of finished products for chemical analysis is a tool that FSIS has used—and will continue to use—to determine whether products are in compliance with regulatory requirements and to verify the effectiveness of in-plant controls. To be most effective, such sampling and analysis would be carried out in conjunction with Agency HACCP-verification and other verification activities.

FSIS also regards market sampling as a potentially useful tool for enforcing the statutes prohibiting the distribution in commerce of adulterated and misbranded meat and poultry products and for checking the effectiveness of establishment process controls.

Marketplace sampling and testing can also help in addressing food safety hazards arising in post-processing distribution of meat and poultry products.

This proposal would affect, overall, as many as 72 poultry slaughtering establishments and about 3,550 establishments that process meat and poultry products beyond slaughtering, dressing, and cut-up. The most far-reaching effect of the rule would be to increase the flexibility establishments have in controlling their processes. This benefit would arise from eliminating the required PQC program elements in §§ 318.4(d) and 381.145(d).

With or without this proposal, establishment HACCP plans will supersede or incorporate the few PQC programs that control food-safety factors. Under the proposal, most establishments that have PQC programs that control for non-food safety factors would continue to use the programs. In all likelihood, in developing new PQC programs, they would continue to include the information now required by FSIS. They would also be free to adopt other methods of process control and different techniques of observation, measurement, documentation, recordkeeping, and evaluation than are prescribed in the current regulations. They could change their PQC-controlled operations to integrate their food quality process control more effectively with their HACCP system operations to improve overall efficiency. For example, raw material control, now a required element in PQC programs, could be handled under an establishment's HACCP plan, as could process controls for food safety. Similarly, the records requirements for PQC programs could be superseded by more efficient and appropriate establishment-developed systems. Establishments would thus be able to achieve unquantifiable gains in efficiency that would yield food-safety and other consumer-protection benefits.

FSIS-inspected establishments develop about 1,900 PQC programs a year according to regulatory design specifications. Assuming that a PQC program is developed by a QC manager earning about \$26 an hour, and that it takes about 20 hours, on average, to develop a PQC program, the cost to an establishment of developing such a program is about \$520. FSIS estimates that the cost to the regulated industry of developing such programs is about \$1,000,000 per year.

This cost of developing PQC programs according to FSIS requirements, plus \$13 million in annual operating costs for about 1,852 mandatory (required by regulation) PQC programs (\$26/hr. X

260 hrs./yr./program X 1,852 programs), add up to about \$14 million in costs to the regulated industry.

For most establishments, the proposal would not yield immediate, direct savings from removal of burdens associated with developing PQC programs because most PQC programs are voluntarily adopted by establishments. Establishments likely would continue the use of QC methods in their operations, so the removal of the regulatory requirement for establishments to follow the regulatory design specifications would not immediately yield a savings to establishments. Further, a substantial proportion of the costs of complying with this regulation was removed with the publication of the final rule eliminating prior approvals for facilities, equipment, and PQC programs (62 FR 45016; August 25, 1997).

However, FSIS currently requires that if establishments adopt PQC programs, the programs must meet certain design specifications and must contain certain specified information. Some establishments that are required to have PQC programs for certain products and processes would benefit from the removal of burdens associated with developing PQC programs. These establishments, including those involved in producing MS(S), meat cuts treated with organic acids, and other processing, could benefit from shifting some portion of their PQC program development and operation costs into HACCP-related or other activities.

Also, under the proposed regulatory amendments, establishments would have greater freedom to innovate. An indeterminate proportion of the annual burden of developing PQC programs according to FSIS specifications could eventually be channeled into more efficient and effective use of industry resources, especially where PQC programs have been operated.

Thus, although there would not be a direct savings from the removal of the regulatory requirements governing PQC programs, the industry potentially would be able to make more efficient and effective use of the \$1 million or so in annual costs of developing the programs.

Finally, the proposed rule would permit FSIS to reallocate field inspection and headquarters resources now used in oversight of establishment-operated PQC programs to higher priority food safety-related activities.

Regulatory Flexibility Act

The Administrator of FSIS has determined that this proposed rule will not have a significant effect on a

substantial number of small entities. The proposal would affect about 72 poultry slaughtering establishments, most of which are large business enterprises. It also would affect as many as 3,550 official meat and poultry processing establishments, of which a substantial majority, 3,330, are considered small entities under Small Business Administration criteria (500 or fewer employees per establishment). However, the proposal would not have a significant effect on these establishments. It would impose no new regulatory requirements necessitating investments or other resource commitments by establishments but would, by removing a number of existing regulatory requirements, permit more efficient resource utilization, especially to support establishment HACCP systems.

The proposal would remove most remaining requirements for establishments to have PQC programs for certain products or processes and the general requirement concerning the design of such programs. The proposal would give inspected establishments greater flexibility to innovate and to introduce new processes or products that meet HACCP or other consumer protection objectives. As a result, the proposal would theoretically provide several thousand dollars of regulatory relief annually per establishment.

The proposal would enable establishments to avoid the costs associated with developing and implementing PQC programs that address regulatory requirements for the use of certain substances in preparation of meat and poultry products, such as the use of organic acids to delay discoloration of fresh meat cuts. Thermal processing establishments (of which there are about 130) would avoid the costs associated with developing PQC programs according to Agency specifications and the costs associated with obtaining Agency prior approvals.

As many as 3,330 small establishments would no longer be required to operate PQC programs for certain processes (such as PQC programs for processing cooked beef) and products (such as mechanically separated, or "deboned," product). Small and large establishments would theoretically save about \$520 per PQC program in development costs for 320 mandatory PQC programs, or \$161,720 total. Out of this total, small establishments would save about \$151,320. Small establishments could thus be expected to save about \$4,000 each in annual recurring costs associated with developing mandatory PQC programs.

Operating costs of PQC programs vary widely. A simple PQC program to verify the accuracy of scales, for example, may require that tests be performed only several times a year, at little cost in operator time. A PQC program for a complex process, on the other hand, may require daily tests and data collection and recordkeeping tasks lasting up to 4 hours. For the purposes of this document, PQC programs are each assumed to require up to 1 hour's worth of daily attention by the establishment QC specialist. The removal of the PQC requirements would, at least theoretically, relieve small establishments of these burdens.

Assuming, for example, that small establishments incur annual costs of about \$12,000,000 in operating mandatory PQC programs (solely in operating the QC evaluation process of such programs, and not including laboratory analysis, and other special facilities that may be required to determine whether products are in compliance with the regulations), each establishment could theoretically save about \$4,000 in PQC program operations.

In addition, small establishments would benefit through unquantifiable savings accruing from removal of regulatory design requirements for both mandatory and voluntary PQC programs. They would have additional flexibility, beyond the removal of prior approval requirements effected by FSIS Docket No. 95-032F, to develop and implement HACCP-consistent or other process control systems.

Thus, about \$8,000 in recurring savings could theoretically accrue to each small meat and poultry establishment. However, because many, if not most, affected establishments would be likely to continue to operate PQC programs that help in producing products with consistent and uniform characteristics, establishments may not choose to reap the theoretical savings that could result from eliminating their PQC programs. The effect of the proposed rule on the substantial number

of affected small establishments would thus not likely be substantial.

Paperwork Requirements

Title: Processing Procedures and Quality Control Systems.
Type of Collection: Revision.
Abstract: FSIS has reviewed the paperwork and recordkeeping requirements in this proposed rule in accordance with the Paperwork Reduction Act. This proposed rule would substantially reduce reporting requirements for official establishments. The proposed rule would remove the design requirements affecting most PQC programs that establishments have and most requirements for establishments to have PQC programs for certain products or processes. Currently, there are 624,465 burden hours associated with the PQC program requirements. FSIS will request OMB to eliminate all these burden hours from the information collection request 0083-0089.

List of Subjects

9 CFR Part 317

Meat inspection, Reporting and recordkeeping requirements.

9 CFR Part 318

Meat inspection, Reporting and recordkeeping requirements.

9 CFR Part 319

Food labeling, Meat inspection.

9 CFR Part 381

Poultry and poultry products, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, FSIS is proposing to amend 9 CFR Chapter III, the Federal meat and poultry inspection regulations, as follows:

PART 317—LABELING, MARKING DEVICES, AND CONTAINERS

1. The authority citation for part 317 would continue to read as follows:

Authority: 21 U.S.C. 601-695; 7 CFR 2.18, 2.53.

§ 317.21 [Amended]

2. Paragraph (b) of § 317.21 would be amended by removing the comma and all words following the word "person".

PART 318—ENTRY INTO OFFICIAL ESTABLISHMENTS; REINSPECTION AND PREPARATION OF PRODUCTS

3. The authority citation for part 318 would continue to read as follows:

Authority: 7 U.S.C. 138f, 450, 1901-1906; 21 U.S.C. 601-695; 7 CFR 2.18, 2.53.

§ 318.4 [Amended]

4. Paragraph (d) of § 318.4 would be removed.

5. Section 318.7 would be amended to read as follows:

a. Paragraphs (b)(3)(i) and (b)(3)(ii) would be revised;

b. The table in paragraph (c)(4), under the Class of substance "Miscellaneous," the entry for the Substance "Ascorbic acid, erythorbic acid, citric acid, sodium acetate, and sodium citrate, singly or in combination" would be revised.

The revisions would read as follows:

§ 318.7 Approval of substances for use in the preparation of products.

* * * * *

(b) * * *

(3) * * *

(i) 100 ppm ingoing (potassium nitrite at 123 ppm ingoing); and 550 ppm sodium ascorbate or sodium erythorbate (isoascorbate) shall be used; or

(ii) A predetermined level between 40 and 80 ppm (potassium nitrite at a level between 49 and 99 ppm); 550 ppm sodium ascorbate or sodium erythorbate (isoascorbate); and additional sucrose or other similar fermentable carbohydrate at a minimum of 0.7 percent and an inoculum of lactic acid producing bacteria such as *Pediococcus acetolactii* or other bacteria demonstrated to be equally effective in preventing the production of botulinum toxin at a level sufficient for the purpose of preventing the production of botulinum toxin.

* * * * *

(c) * * *

(4) * * *

Class of substance	Substance	Purpose	Product	Amount
*	*	*	*	*
Miscellaneous	Ascorbic acid, erythorbic acid, citric acid, sodium ascorbate and sodium citrate, singly or in combination.	To delay discoloration.	Fresh beef cuts, fresh lamb cuts, and fresh pork cuts.	Not to exceed, singly or in combination, 500 ppm or 1.8 mg/sq inch of product surface of ascorbic acid (in accordance with 21 CFR 182.3013), erythorbic acid (in accordance with 21 CFR 182.3041), or sodium ascorbate (in accordance with 21 CFR 182.3731); and/or not to exceed, singly or in combination, 250 ppm or 0.9 mg/sq inch of product surface of citric acid (in accordance with 21 CFR 182.6033), or sodium citrate (in accordance with 21 CFR 182.6751).

Class of substance	Substance	Purpose	Product	Amount
*	*	*	*	*

6. Paragraphs (a)(1)(ii) and paragraph (f) of § 318.305 would be revised to read as follows:

§ 318.305 Equipment and procedures for heat processing systems.

- (a) * * *
- (1) * * *
- (i) * * *

(ii) *Other devices.* Temperature-indicating devices used in lieu of mercury-in-glass thermometers, such as resistance temperature detectors, shall meet known, accurate standards for such devices when tested for accuracy. The records of such testing shall be available to FSIS program employees.

(f) *Other systems.* All other systems not specifically delineated in this section and used for the thermal processing of canned product shall be adequate to produce shelf-stable products consistently and uniformly.

7. Paragraph (b) of § 318.307 would be revised to read as follows:

§ 318.307 Record review and maintenance.

(b) *Automated process monitoring and recordkeeping.* Automated process monitoring and recordkeeping systems shall be designed and operated in a manner which will ensure compliance with the applicable requirements of § 318.306.

8. In § 318.308, paragraph (b) would be revised, paragraph (c) would be removed and reserved, and paragraph (d) introductory text would be revised to read as follows:

§ 318.308 Deviations in processing.

- (b) Deviations in processing (or process deviations) shall be handled:
 - (1) Under a HACCP plan for thermally processed/commercially sterile product that addresses hazards associated with microbial contamination; or
 - (i) Under the provisions of paragraph (d) of this section; or
 - (2) Until the establishment is subject to part 417 of this chapter,
 - (i) Under an FSIS-approved total quality control system; or
 - (ii) Under alternative documented procedures for handling process deviations that will ensure that only

product that is safe and stable is shipped in commerce.

- (c) [Reserved]
- (d) Procedures for handling process deviations where the HACCP plan for thermally processed/commercially sterile product does not address food safety hazards associated with microbial contamination, where there is no approved total quality control system, or where the establishment has no alternative documented procedures for handling process deviations.

9. In § 318.309, paragraph (a) would be revised, paragraphs (b) and (c) would be removed and reserved, and paragraph (d) introductory text would be revised, to read as follows:

§ 318.309 Finished product inspection.

- (a) Finished product inspections shall be handled:
 - (1) Under the provisions of paragraph (d) of this section;
 - (2) Under a HACCP plan for thermally processed/commercially sterile products that addresses hazards associated with microbiological contamination;
 - (3) Under an FSIS-approved total quality control system; or
 - (4) Under alternative documented procedures that will ensure that only safe and stable product is shipped in commerce.

- (b) [Reserved]
- (c) [Reserved]
- (d) Procedures for handling finished product inspections where the HACCP plan for thermally processed/commercially sterile product does not address food safety hazards associated with microbial contamination, where there is no approved total quality control system, or where the establishment has no alternative documented procedures for handling finished product inspections.

PART 319—DEFINITIONS AND STANDARDS OF IDENTITY OR COMPOSITION

10. The authority citation for part 319 continues to read as follows:
Authority: 7 U.S.C. 450, 1901–1906; 21 U.S.C. 601–695; 7 CFR 2.18, 2.53.

11. Paragraph (e)(2) of § 319.5 would be revised to read as follows:

§ 319.5 Mechanically Separated (Species).

- (e) * * *
 - (2) Analytical methods used by establishments in verifying the fat, protein, and calcium content of product consisting of or containing Mechanically Separated (Species) shall be among those listed in “Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC),” 16th edition, 1995, §§ 960.39, 976.21, 928.08 (Chapter 39), and 940.33 (Chapter 45), which is incorporated by reference, or, if no AOAC method is available, in the “Chemistry Laboratory Guidebook,” U.S. Department of Agriculture, Washington, DC, March 1986 edition, sections 6.011–6.013, Revised June 1987 (pages 6–35 through 6–65), or by appropriate methods validated by scientific bodies in collaborative trials. The “Official Methods of Analysis of the Association of Official Analytical Chemists,” 16th edition, 1995, is incorporated by reference with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51.

§ 319.104 [Amended]

12. Section 319.104 would be amended in paragraph (a) by removing the last sentence of footnote 3 to the chart.

§ 319.105 [Amended]

13. Section 319.105 would be amended in paragraph (a) by removing the last sentence of footnote 2 to the chart.

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

14. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 138f, 450; 21 U.S.C. 451–470; 7 CFR 2.18, 2.53.

15. Section 381.76 would be amended to read as follows:

- a. Paragraph (b)(1)(ii)(b) would be revised.
- b. Paragraph (b)(1)(iii)(b) would be revised.
- c. Paragraph (b)(4)(i)(a), introductory text, would be revised.
- d. Paragraph (b)(4)(i)(b) would be revised.
- e. Paragraph (b)(4)(ii) would be removed and reserved.

- f. Paragraph (b)(4)(iii) would be removed and reserved.
 - g. Paragraph (b)(5)(i)(a) introductory text, would be revised.
 - h. Paragraph (b)(5)(i)(b) would be revised.
 - i. Paragraph (b)(5)(ii) would be removed and reserved.
 - j. Paragraph (b)(5)(iii) would be removed and reserved.
 - k. Paragraph (c) would be removed.
- The revisions would read as follows:

§ 381.76 Post-mortem inspection, when required; extent; traditional, Streamlined Inspection System (SIS), New Line Speed (NELS) Inspection System and the New Turkey Inspection (NTI) System; rate of inspection.

* * * * *

- (b)(1) * * *
- (ii) * * *

(b) The Administrator determines that the establishment has the intent and capability to operate at line speeds greater than 70 birds per minute, and meets all the facility requirements in § 381.36(d).

- (iii) * * *

(b) The Administrator determines that the establishment meets all the facility requirements in § 381.36(e).

* * * * *

- (4) * * *
- (i) * * *

(a) Post-mortem inspection. The establishment shall provide three inspection stations on each eviscerating line in compliance with the facility requirements § 381.36(d)(1). The three inspectors shall inspect the inside, viscera, and outside of all birds presented. Each inspector shall be flanked by two establishment employees—the presenter and the helper. The presenter shall ensure that the bird is properly eviscerated and presented for inspection and the viscera uniformly trailing or leading. The inspector shall determine which birds shall be salvaged, reprocessed, condemned, retained for disposition by the veterinarian, or allowed to proceed down the line as a passed bird subject to reinspection. Poultry carcasses with certain defects not requiring condemnation of the entire carcass shall be passed by the inspector, but shall be subject to reinspection to ensure the physical removal of the specified defects. The helper, under the supervision of the inspector, shall mark such carcasses for trim when the defects are not readily observable. Trimming or birds passed subject to reinspection shall be performed by:

* * * * *

(b) A reinspection station shall be located at the end of each line. This

station shall comply with the facility requirements in § 381.36(d)(2). The inspector shall ensure that the establishment has performed the indicated trimming of carcasses passed subject to reinspection by visually monitoring, checking data, and/or gathering samples at the station or at other critical points on the line.

- (ii) [Reserved]
- (iii) [Reserved]
- (5) * * *
- (i) * * *

(a) *Post-mortem inspection.* Each inspection station must comply with the facility requirements in § 381.36(e)(1). Each inspector shall be flanked by and establishment employee assigned to be the inspector's helper. The one inspector on an NTI-1 Inspection System shall be presented every bird. Each inspector on an NTI-2 Inspection System line shall be presented every other bird on the line. An establishment employee shall present each bird to the inspector properly eviscerated with the back side toward the inspector and the viscera uniformly trailing or leading. Each inspector shall inspect the inside, viscera, and outside of all birds presented. The inspector shall determine which bird shall be salvaged, reprocessed, condemned, retained for disposition by a veterinarian, or allowed to proceed down the line as a passed bird subject to reinspection. Turkey carcasses with certain defects not requiring condemnation of the entire carcass shall be passed by the inspector, but shall be subject to reinspection to ensure the physical removal of the specified defects. The helper, under the supervision of the inspector, shall mark such carcasses for trim when the defects of birds passed subject to reinspection shall be performed by:

* * * * *

(b) *Reinspection.* A reinspection station shall be located at the end of the lines. This station shall comply with the facility requirements in § 381.36(e)(2). The inspector shall ensure that establishments have performed the indicated trimming of each carcass passed subject to reinspection by visually monitoring, checking data, and/or sampling product at the reinspection station and, if necessary, at other points, critical to the wholesomeness of product, on the eviscerating line.

- (ii) [Reserved]
- (iii) [Reserved]

§ 381.121d [Amended]

16. Paragraph (b) of § 381.121d would be amended by removing the comma and all words following the word "person."

§ 381.145 [Amended]

17. Paragraphs (d) and (e) of § 381.145 would be removed.

18. Paragraphs (a)(1)(ii) and (f) of § 381.305 would be revised to read as follows:

§ 381.305 Equipment and procedures for heat processing systems.

- (a) * * *
- (1) * * *

(ii) *Other devices.* Temperature-indicating devices used in lieu of mercury-in-glass thermometers, such as resistance temperature detectors, shall meet known, accurate standards for such devices when tested for accuracy. The records of such testing shall be available to FSIS program employees.

* * * * *

(f) *Other systems.* All other systems not specifically delineated in this section and used for the thermal processing of canned product shall be adequate to produce shelf-stable products consistently and uniformly.

* * * * *

19. Paragraph (b) of § 381.307 would be revised to read as follows:

§ 381.307 Record review and maintenance.

* * * * *

(b) *Automated process monitoring and recordkeeping.* Automated process monitoring and recordkeeping systems shall be designed and operated in a manner which will ensure compliance with the applicable requirements of § 381.306.

* * * * *

20. In § 381.308, paragraphs (b) would be revised, paragraph (c) would be removed and reserved, and paragraph (d) introductory text would be revised to read as follows:

§ 381.308 Deviations in processing.

* * * * *

(b) Deviations in processing (or process deviations) shall be handled:

(1) Under a HACCP plan for thermally processed/commercially sterile product that addresses hazards associated with microbial contamination; or

(i) Under the provisions of paragraph (d) of this section; or,

(ii) Under a HACCP plan for thermally processed/commercially sterile product that addresses hazards associated with microbial contamination; or

(2) Until the establishment is subject to part 417 of this chapter,

(i) Under an FSIS-approved total quality control system; or

(ii) Under alternative documented procedures for handling process deviations that will ensure that only product that is safe and stable is shipped in commerce.

(c) [Reserved]

(d) Procedures for handling process deviations where the HACCP plan for thermally processed/commercially sterile product does not address food safety hazards associated with microbial contamination, where there is no approved total quality control system, or where the establishment has no alternative documented system or procedures for handling process deviations.

* * * * *

21. In § 381.309, paragraph (a) would be revised, paragraphs (b) and (c) would be removed and reserved, and paragraph (d) introductory text would be revised, to read as follows:

§ 381.309 Finished product inspection.

(a) Finished product inspections shall be handled:

(1) Under the provisions of paragraph (d) of this section;

(2) Under a HACCP plan for thermally processed/commercially sterile products that addresses hazards associated with microbiological contamination;

(3) Under an FSIS-approved total quality control system; or

(4) Under alternative documented procedures that will ensure that only product that is safe and stable is shipped in commerce.

(b) [Reserved]

(c) [Reserved]

(d) Procedures for handling finished product inspections where the HACCP plan for thermally processed/commercially sterile product does not address food safety hazards associated with microbial contamination, where there is no approved total quality control system, or where the establishment has no alternative procedures for handling finished product inspections.

* * * * *

Done at Washington, DC, on May 11, 1999.

Thomas J. Billy,
Administrator.

[FR Doc. 99-12352 Filed 5-17-99; 8:45 am]

BILLING CODE 3410-DM-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM156, Notice No. 25-99-04-SC]

Special Conditions: McDonnell Douglas Corporation (MDC) Model MD-17 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: The FAA proposes to issue special conditions for the McDonnell Douglas Corporation Model MD-17 airplane. This airplane will have novel and unusual design features, including the use of power-augmented-lift from externally blown flaps, for which the applicable airworthiness standards for transport category airplanes do not contain adequate or appropriate safety standards. This document contains the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that provided by the existing airworthiness standards.

DATES: Comments must be received on or before July 2, 1999.

ADDRESSES: Comments on this document may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Program Management Branch, Attention: Rules Docket (ANM-114), Docket No. NM156, 1601 Lind Avenue SW., Renton, WA 98055-4056; or delivered in duplicate to the Transport Airplane Directorate at the above address. Comments delivered must be marked Docket No. NM156. Comments may be examined in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Gerry Lakin, Project Officer, FAA Transport Airplane Directorate, Standardization Branch, ANM-113, 1601 Lind Avenue SW., Renton, WA 98055-4056; telephone (425) 227-1187; facsimile (425) 227-1149; Email: gerald.lakin@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of these proposed special conditions by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the Rules Docket address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The proposals described in this notice may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking

will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. NM156." The postcard will be date stamped and returned to the commenter.

Background

On July 7, 1996, McDonnell Douglas Corporation, 2401 E. Wardlow Rd., Long Beach, CA 90807-5309, a wholly owned subsidiary of The Boeing Company, submitted an application for type certification of a commercial version of the Model C-17 military airplane, designated as the MDC Model MD-17. The MD-17 is a long range, transport category airplane powered by four Pratt & Whitney F-117-PW-100 engines, which are a military version of the PW2040 engines used on other civil transport category airplane types. The airplane will be offered in a cargo configuration only and is designed for carriage of outsized cargo into short runways.

The MD-17 airplane will be certified as a part 25 transport category airplane and, as such, pilots and flight instructors who operate it will have a standard airplane multiengine rating.

Type Certification Basis

Under the provisions of § 21.17, McDonnell Douglas must show that the MD-17 complies with the applicable provisions of 14 CFR part 25, as amended by Amendments 25-1 through 25-87. In addition, the certification basis includes part 36, as amended at the time of certification; part 34, as amended at the time of certification; any subsequent amendments to part 25 that are required for operation under part 121; and the special conditions resulting from the proposals specified in this notice.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25) do not contain adequate or appropriate safety standards for the MD-17 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the MD-17 must comply with the fuel vent and exhaust emission requirements of part 34 and the noise certification requirements of part 36, and the FAA must issue a finding of regulatory adequacy pursuant to § 611 of Pub. L. 92-574, the "Noise Control Act of 1972."

Special conditions, as appropriate, are issued in accordance with § 11.49 after public notice, as required by §§ 11.28 and 11.29(b), and become part of the type certification basis in accordance with § 21.17(a)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101(a)(1).

MD-17 Design Features

The MD-17 has novel and unusual design features to support the operation of a large transport category sized airplane at airports with very short runways. The MD-17 has externally blown flaps (EBF), which are fixed-vane double slotted flaps that deflect directly into the engine exhaust stream. The MD-17 integrated EBF design includes positioning the engines to provide engine exhaust blowing on the flaps, and flap slots sized to provide engine exhaust flow over both the upper and lower flap and vane surfaces. The resulting flap/exhaust stream interaction provides power-augmented-lift relative to conventional transport category airplane designs. The total lift produced by the EBF is made up of three components: (1) conventional aerodynamic lift produced by the wing and flap; (2) lift due to thrust deflection (the vertical component of the thrust force); and (3) the powered circulation lift (the additional aerodynamic lift resulting from the interaction of the engine exhaust stream on the wing flaps).

To distinguish the new and novel power-augmented-lift design feature of the MD-17 from conventional transport category airplanes, the following definition has been established: Power-augmented-lift means a heavier-than-air airplane capable of operation in regimes of short field takeoff and short field landing, and low speed flight. The airplane depends upon the propulsion system for a significant portion of lift and control during these flight regimes, but relies primarily on conventional wing lift when in the en route configuration.

The MD-17 features Direct Lift Control (DLC), which uses spoilers to provide rapid control of the flight path angle in the down direction for large flight path adjustments without throttle movement. DLC is actuated via push button switches placed on both sides of the thrust levers. Another feature of the MD-17 design that differs from

conventional transport category airplanes is that the spoilers are biased to a non-flush position when the flaps are extended. When in this configuration, separate from the DLC function, the spoilers are linked to the thrust levers to provide airplane response equivalent to instantaneous engine response to thrust lever movement.

The MD-17 Primary Flight Control System (PFCS) provides three-axis control and envelope protection using conventional cockpit controls and control surfaces, and a full authority fly-by-wire Electronic Flight Control System (EFCS) with single-strand mechanical backup. The PFCS provides stability and command augmentation to improve basic airplane characteristics and also integrates the trim and high lift controls.

Pitch and roll control inputs are made through a one-handed center stick controller centrally mounted to the floor in front of each pilot station. In addition to four electronic displays, the cockpit display system incorporates pilot and co-pilot full-time head up displays that can be used as primary flight displays.

The MD-17 will utilize electrical and electronic systems that perform critical functions. Examples of these systems include the electronic displays and electronic engine controls.

As the proposed type design of the MD-17 contains novel or unusual design features not envisioned by the applicable part 25 airworthiness standards, special conditions are considered necessary in the following areas:

Power-Augmented-Lift

1. Stall Speeds and Minimum Operating Speeds

The primary purpose of the EBF design feature on the MD-17 is to reduce the takeoff and landing speeds, and hence the required takeoff and landing distances. The benefits provided by this novel design feature are not adequately addressed by the current part 25 stall speed and minimum operating speeds requirements. A special condition is needed to fully address the benefits of the MD-17 design features on stall speeds and minimum operating speeds, and to provide appropriate safety standards to ensure equivalent safety with current part 25 requirements.

The part 25 minimum allowable operating speeds are derived from power-off (i.e., zero thrust or power) stall speeds (V_S), except in those instances where the operating speeds are limited by some other constraint.

Appropriate multiplying factors are applied to these power-off stall speeds to provide adequate safety in the one-engine-inoperative power-on condition. The beneficial effects of power-on available lift due to both circulation effects and thrust inclination were well known at the time the airworthiness requirements were developed. Evidence for this point is provided by the requirements associated with the minimum takeoff safety speed, V_{2MIN} , in § 25.107(b). For airplanes without "significant" power-augmented-lift effects in the one-engine-inoperative condition, V_{2MIN} must not be less than $1.20 V_S$, or $1.13 V_S$ if the 1-g stall speed is used. However, for airplanes that realize a significant reduction in stall speed in the one-engine-inoperative power-on condition, the multiplying factor is reduced to 1.15. According to the explanatory information associated with this requirement that is provided in Civil Aeronautics Manual 4b, "The difference in the required factors * * * provides approximately the same margin over the actual stalling speed under the power conditions which are obtained after the loss of an engine. * * *"

The MD-17 power-augmented-lift design, however, achieves significantly more lift from power than would be taken into account by the part 25 requirements. At the conditions applicable to the determination of the takeoff safety speed, V_2 , the MD-17 achieves a 15 percent reduction in power-on stall speed. The four percent reduction in V_2 speed permitted by § 25.107(b)(2) for "turbojet powered airplanes with provisions for obtaining a significant reduction in the one-engine-inoperative power-on stalling speed" would therefore not provide "approximately the same margin over the actual stalling speed as conventional transport category airplanes in the one-engine-inoperative power-on condition." A further reduction in V_2 speed could be made while maintaining the same margin over the one-engine-inoperative power-on stall speed.

At approach thrust, the MD-17 achieves over a 50 percent increase in lift due to power-augmented-lift effects. In the maximum landing flap configuration, the thrust used for a stable approach results in a stall speed reduction of approximately 20 percent relative to the zero thrust stall speed. There are no provisions in part 25, however, for allowing the landing approach speed to be reduced to account for the beneficial effects of power-augmented-lift on stall speeds. For a conventional transport category airplane, thrust or power may vary

considerably during the landing approach, including reductions to idle thrust or power. During the landing flare for a conventional transport category airplane, thrust is typically reduced to idle.

The MD-17 power-augmented-lift design, however, requires a significant thrust level to be maintained during the approach to remain on the desired approach flight path. Unlike conventional transport category airplanes, only minor thrust modulation may be necessary during the approach to maintain or recover the desired flight path. The MD-17 design features and operational procedures will discourage use of thrust reductions to make flight path adjustments during approach. Adjustments in speed are obtained through changes in airplane pitch attitude during approach. In addition, the MD-17 is designed to provide very stable controllability characteristics to allow very slow approach speeds using a backside control technique, which is explained later in this preamble. With the backside control technique, airplane pitch attitude is used to control airspeed and thrust is used to control flight path angle.

As stated earlier, the MD-17 incorporates a DLC feature, which uses the spoilers to provide rapid control of the flight path angle in the down direction for large flight path adjustments without throttle movement. DLC is actuated via push button switches placed on both sides of the thrust levers. Separate from the DLC function, the spoilers are biased to a non-flush position in the flaps extended configurations. In this configuration, the spoilers are linked to the thrust levers to provide an airplane response equivalent to instantaneous engine response to thrust lever movement. This feature provides a high level of control feedback and further minimizes the need for thrust adjustments. Because of the unique characteristics of the MD-17 power-augmented-lift design, thrust reduction is not used to reduce the rate of descent at touchdown. Instead, a slight thrust increase may sometimes be used to accomplish this task when desired.

To establish a level of safety equivalent to that established in the regulations, the MD-17 minimum operating speeds should provide approximately the same margin over the stall speed as conventional transport category airplanes under the power conditions that are obtained after the loss of an engine. In a power-augmented-lift airplane like the MD-17, significant increases in lift capability can be achieved not only by increasing

angle of attack, but also by increasing thrust. During the takeoff phase of flight, there is no capability to add lift due to power because operation is already based on the use of the maximum thrust available. For approach and landing, however, the lift reserve due to thrust is much greater than that available on conventional transport category airplanes. A rapid lift increase due to increasing thrust is achievable on the MD-17 because it uses not only a higher approach power setting than conventional transport category airplanes, but also spoiler modulation to compensate for engine spool-up time. The higher approach power setting is necessary to compensate for the high induced drag from the power-augmented-lift effects, and to compensate for the relatively high profile drag of the approach and landing configurations, which include spoilers that are biased in the up direction. Advancing the thrust levers modulates the spoilers such that engine spool-up time is compensated for and a rapid increase in lift is achieved.

In addition, the MD-17 design incorporates a feature in which the deployed spoilers will be retracted should the airplane exceed a predetermined angle-of-attack that is less than the stall angle-of-attack. The stall speeds are defined assuming that the spoilers are flush to the wing at the point of stall. McDonnell Douglas must demonstrate to the FAA that the probability of the failure of any system that could change the calculated stall speeds by one-half knot or more is improbable.

Because there is no regulatory requirement to determine one-engine-inoperative power-on stall speeds, there is only limited data available to the FAA for assessing the margins attained under these conditions by the current fleet of conventional transport category airplanes. Based on the limited data that are available, and on the precedent established by Civil Air Regulations part 4b and part 25 for powered-lift credit, on average, conventional transport category airplanes without provisions for obtaining significant lift from power obtain approximately a 4-5 percent reduction in stall speed in the one-engine-inoperative power-on condition. This 4-5 percent reduction in stall speed applies to both the takeoff configuration at takeoff power and the landing configuration at the power for a 3-degree glideslope.

To retain equivalent safety, the MD-17 minimum operating speed in the takeoff configuration, V_2 , should retain the additional 4-5 percent safety margin in the one-engine-inoperative power-on

stall speed currently obtained on conventional transport category airplanes. To use one-engine-inoperative power-on stall speeds to determine V_{2MIN} for the MD-17, the multiplying factor used to derive V_{2MIN} from power-off stall speeds for conventional transport category airplanes should therefore be increased by not less than 4 percent (i.e., V_{2MIN} must be 1.18 times the power-on 1-g stall speed, rather than 1.13 times the power-off 1-g stall speed). In determining the thrust effects on stall speeds for V_{2MIN} determination, the thrust or power on the operating engines should be no greater than the minimum power that may exist at any point in the takeoff (or derated takeoff) power or thrust for the minimum engine would normally be determined at a height of 1500 feet above the runway surface at the appropriate takeoff power setting for the conditions existing at the time of takeoff. However, if the effect of altitude on takeoff thrust or power up to 1500 feet above the runway surface has a negligible impact on power-on stall speed used for V_{2MIN} determination, thrust or power at the runway height may be used. McDonnell Douglas has provided the FAA with data which show, for the MD-17 power-augmented-lift design, that the effect of altitude on takeoff thrust up to 1500 feet above the runway surface has a negligible (less than 0.5 knots) impact on MD-17 power-on stall speeds used for V_{2MIN} determination.

As noted above, the MD-17 incorporates several design features and operating characteristics that result in significant fundamental differences from the way conventional transport category airplanes are flown in the approach and landing phase of flight. During approach to landing, the MD-17's power-augmented-lift allows it to fly at speeds that are less than the speed at which total airplane drag is a minimum. Therefore, the MD-17 will be operating on the "backside" of the drag (or power) curve, which means that drag increases as speed is reduced and drag is reduced as speed increases. This variation of drag with speed is in the opposite sense to that normally encountered on conventional transport category airplanes operating at higher approach speeds.

A significant consequence of operating on the backside of the drag curve is that MD-17 pilots will use a different technique for controlling airspeed and flight path than is used on conventional transport category airplanes. In the MD-17, the thrust levers (including the DLC switches) are

the primary means for controlling flight path for approach and landing. Thrust is increased to reduce descent angle. To increase descent angle, the MD-17 pilot will use small reductions in thrust to make small down flight path adjustments, and will use the DLC thumb switch on the thrust lever to make large down flight path corrections. In effect, the MD-17 pilot uses the throttles in a similar manner to the way a helicopter pilot uses the collective pitch lever. In contrast, the pilot of a conventional transport category airplane primarily uses the pitch control device for flight path control. For airspeed control, the MD-17 pilot uses pitch, while the pilot of a conventional transport category airplane primarily uses thrust.

Another significant characteristic of the power-augmented-lift MD-17 design is that, while operating on the backside of the drag curve, there is not much cross-coupling between pitch and thrust controls. This means that changes in thrust result primarily in changes to the flight path with very little effect on airspeed. Similarly, changes in pitch affect primarily airspeed with little change to the flight path. In combination with a full-authority three-axis fly-by-wire stability and control augmentation system, this characteristic ensures accurate airspeed control during manipulation of the thrust levers to control the flight path descent angle. On a conventional transport category airplane, manipulation of the pitch control to change the flight path will result in unwanted airspeed excursions. For example, a one degree change in flight path takes four seconds in a conventional transport category airplane and is accompanied by a seven knot speed change, while the same change in flight path for a powered-lift airplane takes one second and does not result in a speed change.

Analysis of C-17 flight test and piloted simulator data support a conclusion that airspeed can be controlled to a much higher degree of precision during an approach with this airplane than with a conventional transport category airplane. The analysis shows that the standard deviation in speed due to maneuvering varied from 1 to 1.3 knots, while the speed excursions due to horizontal gusts ranged from 1.6 to 5.3 knots for light to severe turbulence levels. (The 5.3 knot deviation corresponded with severe turbulence, including a 30-knot crosswind and 33-knot headwind at a height of 50 feet above the runway.) The standard deviation for the flight test approaches for reported crosswinds of 13 to 31 knots, including both steep and

normal path approaches, was about 3.5 knots.

The unique MD-17 design features and operating characteristics discussed above support a reevaluation of the minimum operating speed for the approach and landing phase of flight. These design features and operating characteristics provide the capability for rapid increases in lift from thrust in the approach and landing configurations. Unlike conventional transport category airplanes, there is no need to reduce thrust to idle at any point in the approach or landing (until after touchdown) for controlling either the flight path or rate of sink at touchdown. Also, airspeed can be controlled very accurately even when flight path changes are being made. Since large thrust decreases will not be necessary nor will thrust be reduced to idle during the approach, and rapid lift increases are available through the use of the thrust levers, the FAA considers the use of one-engine-inoperative power-on stall speeds in determining the reference landing speed, V_{REF} , for the MD-17 to provide equivalent safety to conventional transport category airplanes. In addition, due to the capability for more accurate airspeed control during the approach, the FAA considers it appropriate to reduce the multiplying factor applied to the reference stall speed in determining V_{REF} . For the MD-17, V_{REF} may not be less than 1.20 times the one-engine-inoperative power-on stall speed.

However, until more operational experience is gained with power-augmented-lift airplanes, the FAA will not allow an applicant to establish operating speeds for transport category airplanes lower than the power-off stall speed. To provide some margin between the operating speeds and the power-off stall speed, the MD-17's minimum operating speeds must provide at least a 3 percent speed margin above the power-off stall speed.

In addition to the speed margin obtained by applying factors to the one-engine-inoperative power-on stall speeds, other constraints on the minimum operating speeds must be considered due to the unique characteristics of power-augmented-lift airplanes. For conventional transport category airplanes, providing an airspeed margin between the operating speed and the stall speed provides an adequate angle-of-attack margin to stall. For a power-augmented-lift airplane like the MD-17, however, separate airspeed, angle-of-attack, and thrust margins must be considered. Maneuvering capability may also be more of a concern on a power-augmented-lift airplane because

of the difference in thrust effects for a maneuver at a constant airspeed compared to a slowdown maneuver.

Thrust Margin

On the MD-17, variations in thrust at a constant airspeed result in variations in the stall speed margin. While this characteristic provides the capability to increase lift (and hence stall speed margin) simply by increasing thrust, there is also a potential for reductions in stall speed margin following a thrust reduction. On a conventional transport category airplane, where thrust is used primarily to control airspeed, thrust reductions to idle can and do occur. On the MD-17, thrust is used to control flight path rather than airspeed. The DLC feature removes the need for large thrust reductions, and loss of stall margin due to transient thrust reductions can be recovered quickly. Additionally, because V_{REF} is based on the one-engine-inoperative power-on stall speed, additional margin is present in the normal all-engines-operating condition. For the MD-17, the proposed V_{REF} would result in a speed approximately 1.27 times the power-on stall speed with all-engines-operating at the thrust required to maintain the reference approach flight path angle. At maximum thrust, the proposed V_{REF} would be 1.30 times greater than the resulting power-on stall speed.

Another type of thrust variation would be a steady-state thrust reduction that may, for example, be caused by a steady or increasing tailwind, or a decreasing headwind. In this type of situation, attempting to maintain a steady approach path with respect to the ground would result in a steeper descent path angle, which would most likely be attained by a lower thrust setting rather than through use of the DLC. For an approach at the limiting tailwind condition, the steeper approach flight path angle relative to the air mass reduces the MD-17 airspeed margin to stall by less than one knot for normal and steep approaches.

Based on the information presented above, an additional airspeed margin to allow for thrust variation is not considered necessary. The thrust or power on the operating engines used in the stall speed determination for V_{REF} should be the power or thrust used to maintain the steady-state reference flight path angle at V_{REF} . For the MD-17, the reference flight path angle is defined as -3 degrees for a normal approach, and the shallower of -5 degrees or the flight path angle associated with a descent rate of 1000 feet per minute for a steep approach.

Maneuvering Capability

During a banked turn, a portion of the lift generated by the wings provides a force to help turn the airplane. To remain at the same altitude, the airplane must produce additional lift. Therefore, banking the airplane (at a constant speed and altitude) reduces the stall margin, which is the difference between the lift required for the maneuver and the maximum lift capability of the wing. As the bank angle increases, the stall margin is reduced proportionately. Ignoring Mach effects, this bank angle effect on the stall margin can be determined analytically for conventional airplanes, and the multiplying factors applied to the stall speed to determine the minimum operating speeds are intended to ensure that an adequate stall margin is maintained.

For the MD-17, however, the effect of power-augmented-lift on stall speeds differs between a slowdown maneuver (i.e., a wings level deceleration) and a banked turning maneuver at a constant airspeed. The speed reduction during a slowdown maneuver results in a larger contribution of lift from thrust than is provided in a constant speed maneuver. Therefore, for a power-augmented-lift airplane like the MD-17, the stall C_L would be lower in a constant speed turning maneuver than in a slowdown maneuver. To ensure an equivalent level of safety, the MD-17 minimum operating speeds should provide a maneuver margin equivalent to conventional transport category airplanes.

The existing part 25 regulations do not prescribe specific maneuvering margin requirements. However, as part of the proposed 1-g stall amendment to part 25, maneuvering margin requirements are proposed in Notice 95-17 (61 FR 1260, January 18, 1996). These proposed maneuvering margin requirements represent the minimum maneuvering margin to stall warning (or other characteristic that might interfere with normal maneuvering) expected for the current fleet of transport category airplanes. To provide equivalent maneuvering capability within the operational flight envelope, the MD-17 must comply with maneuvering margin requirements equivalent to those proposed in Notice 95-17, except that the thrust used for the maneuvering capability at V_{REF} may be adjusted as necessary during the maneuver to maintain the reference approach flight path angle. This change is considered appropriate for the backside control technique that will be used on the MD-17, where thrust, rather than pitch, is

used as the primary parameter to control flight path.

Angle-of-attack Margin

Another characteristic of power-augmented-lift airplanes like the MD-17 is that the stall angle-of-attack during a slowdown maneuver can be higher than the stall angle-of-attack achieved at higher speeds. Again, this characteristic results from the variation of the effect of power-on lift as speed varies. At higher airspeeds, the contribution of power-augmented-lift can be less than at lower airspeeds. From an operational standpoint, this characteristic can be critical during the approach to landing phase of flight, where a sharp-edged vertical gust could induce a large change in the angle-of-attack at approach speed. For a conventional transport category airplane, where the angle-of-attack margin is generally directly related to airspeed, vertical gust margins are assured by the speed multiples applied to stall speeds when determining the minimum allowable operating speeds. For power-augmented-lift airplanes, this may not be true; therefore, the vertical gust margin must be evaluated independently.

For conventional transport category airplanes, it has been determined that approximately 20 knots of vertical gust margin is provided at the minimum landing approach speed. (Reference: Report No. FAA-RD-76-100, "Progress Toward Development of Civil Airworthiness Criteria for Powered-Lift Aircraft," May 1976, a copy of which is included in the official docket for these special conditions.) To provide equivalent safety, a vertical gust margin of 20 knots will be included as a constraint on V_{REF} for the MD-17 with all engines operating. To ensure safety in the event of an engine failure, the vertical gust margin in the one-engine-inoperative condition must also be considered. Considering the short time period for operation in this failure condition, the FAA has concluded that a vertical gust margin of 15 knots will be required.

Proposed Special Condition No. 1 for MD-17 stall speeds and minimum operating speeds takes into account power-augmented-lift effects for configurations with flaps extended. Additionally, the FAA has determined that the MD-17 stall speeds will be based on 1-g stall criteria consistent with those proposed in Notice 95-17.

Systems

2. Head Up Display (HUD) Used as Primary Flight Display (PFD)

The MD-17 flight deck is equipped with two monochrome head up displays (HUD), one at each pilot station. They are centrally located in front of each pilot, above the glareshield at the pilot's eye level, and between the pilot and the forward window. The MD-17 dual HUD functions as the Primary Flight Display (PFD) for all regimes of normal and abnormal operation and performs the functions of certain primary flight instruments required for transport category airplanes by § 25.1303. The information is electronically projected on a transparent surface with monochrome strokes. It may be used as the only visible display, without any alternative flight instrument indications displayed at the pilot station.

Until recently, HUD certification did not require a special condition because conventional, certified primary flight instruments were also provided at each pilot station and were always visible. The MD-17 dual-HUD installation has the novel and unique feature of being used when it is the only visible display of primary flight information, which is not fully addressed by the current regulations. Therefore, special conditions are proposed for the MD-17 dual HUD installation in the following areas.

Arrangement and Visibility

Section 25.1321(b) states that the "flight instruments required by § 25.1303 must be grouped on the instrument panel. * * *" Because of the MD-17 HUD location and its function as the only visible display of primary flight information, § 25.1303 does not adequately address the MD-17 HUD's novel and unique features.

As described above, the HUD is not in the same visual field as the instrument displays on the instrument panel. The electronically displayed information is projected on a transparent surface and focused at a distance (i.e., optical infinity). Unlike instrument scanning between displays on the instrument panel, when scanning between the HUD and the instrument panel the pilot's eyes must substantially change viewing angle (about 15 degrees), light adaptation, and focus (from infinity to 2 feet). Furthermore, information displayed on the instrument panel cannot as easily be viewed in the pilot's peripheral vision while simultaneously viewing the HUD, when compared to viewing the suite of conventional flight instruments.

Therefore, in addition to compliance with § 25.1321(b), a special condition is proposed to require that the HUD provide all information necessary for rapid pilot evaluation of the airplane's flight state and position, during all phases of flight, for manual control of the airplane, and for pilot monitoring of the performance of the automatic flight control system. The HUD must provide equivalent situational awareness of critical information that is normally displayed near but not on the conventional PFD.

Pilot Compartment View and HUD Optical Characteristics

Section 25.1321(a) requires that "[e]ach flight, navigation, and powerplant instrument for use by any pilot must be plainly visible to him from his station with the minimum practicable deviation from his normal position and line of vision when he is looking forward along the flight path." When the pilot is viewing conventional flight instruments, the variations of pilot seating positions are not significant in the pilot's ability to view the flight instruments. However, with the HUD, the optical characteristics require that the pilot's eyes be located within a very small volume to view all of the required information, which is not adequately addressed by § 25.1321(a). There is much less tolerance for changes in eye position and viewing angles when viewing the HUD. Hence, the proposed special condition ensures that primary flight information remains visible to the pilot without inadvertent lapses. In addition to compliance with § 25.1321(a), the proposed special condition ensures that the HUD information is fully visible from the cockpit design eye position, at which the required angular dimensions of the external field of view, visibility of other cockpit instruments, and access to cockpit controls are simultaneously realized. Furthermore, the special condition ensures that pilot viewing of the HUD does not unduly restrict pilot head movement, cause unacceptable fatigue or discomfort, or interfere with other required pilot duties.

Also, unlike conventional flight displays, the HUD displays certain flight information symbols conformally (i.e., graphically with angular position and movement corresponding to the external view and in the same angular scale). Mispositioning of conformal symbolic information can be more hazardous than mispositioning the same information on conventional displays. There is no specific rule that addresses the use of conformal symbolic information as primary flight information. Therefore,

the proposed special condition does not permit the display of electronic or optical misalignment of conformal symbology that would be hazardously misleading.

Compatibility With Other Cockpit Displays

The existing regulations did not anticipate and do not address the monochrome limitations associated with the MD-17 HUD. The HUD electronically displays information with monochrome strokes, while on conventional displays color is used to highlight and distinguish different types of information. On color displays, the warning and caution indications follow the same color scheme, red and amber, respectively, as described in § 25.1322 for warning, caution, and advisory lights. This use of red and amber is consistent across the cockpit and serves to give unmistakable meaning to the indications. The MD-17 HUD must have an equivalent means to unmistakably highlight and distinguish the same information.

The monochrome HUD must also have certain display design features to make other essential flight information conspicuous, distinct, and meaningful to compensate for the lack of multiple colors. For example, the conventional primary attitude indication distinguishes angles on the pitch scale above the horizon (sky) and angles below the horizon (earth) with different colors, such as blue and brown, respectively. To perform its intended function as the primary attitude indicator, and to ensure satisfactory pilot recognition of unusual attitudes, the HUD must provide clear visual distinction between positive and negative pitch angles by means other than color.

In summary, the display format of the HUD can differ from the format of other cockpit displays of the same information due to differences in their capabilities and limitations. These differences must be regulated to ensure that one format is not so unlike the other that the pilot can misinterpret the information hazardously, or that excessive time and attention is required for the pilot to interpret the information. During critical high workload or emergency conditions, the pilot may need to quickly make a transition from the HUD to other flight instruments to continue safe flight. The existing rules do not adequately address the compatibility of different display formats in the MD-17 cockpit. This special condition is required to avoid potentially hazardous workload and

pilot confusion due to display incompatibility.

To address the above identified inadequacies in current regulations as related to the acceptability of the HUD as the primary source of flight information, Special Condition No. 2 is proposed as an appropriate set of requirements.

Additional Recommendations or Supporting Data

In addition to the special condition for the HUD system, there are other regulations and advisory material that, although adequate, warrant special attention due to the unique features of the MD-17 HUD installation. The following discussion of applicable regulations is provided for information in the context of this special condition.

Regulations

- Section 25.771(e): "Vibration and noise characteristics of cockpit equipment may not interfere with safe operation of the airplane." Attention should be paid to the visual effects resulting from vibration of the cockpit and the optical components of the HUD, including vibration associated with engine imbalance resulting from fan blade failure.
- Section 25.773(a)(1): "Each pilot compartment must be arranged to give the pilots a sufficiently extensive, clear, and undistorted view, to enable them to safely perform any maneuvers within the operating limitations of the airplane, including taxiing, takeoff, approach, and landing." Special attention should be paid to this requirement because of the unique location of the HUD combiner, between the pilot's eyes and the forward windshield, compared to conventional displays. The potential of each combiner structure to obstruct the outside view of both pilots (on-side and off-side) should be considered.
- Section 25.773(a)(2): "Each pilot compartment must be free of glare and reflection that could interfere with the normal duties of the minimum flight crew (established under § 25.1523). This must be shown in day and night flight tests under non-precipitation conditions." Special attention should be paid to this requirement because the unique HUD optical system and the location of the combiner, between the pilot's eyes and the forward windshield, can be especially susceptible to and be the cause of a variety of glare and reflections in the cockpit.
- Section 25.785(k): "Each projecting object that would injure persons seated or moving about the airplane in normal flight must be padded." Typical installations of HUD's include components that project into the space near the pilot's head. Attention should be paid to head contact with these components during all expected operations and pilot activities, especially during turbulence.
- Section 25.1301(a): "Each item of installed equipment must be of a kind and design appropriate to its intended function." Previously, HUD's for transport category airplanes have been certified with a fully

certificated set of primary flight instruments/ displays visible on a full-time basis; therefore, the HUD was not required to meet all of the requirements for primary flight instruments. However, the MD-17 HUD's are a primary source of flight information and must comply with those requirements, because alternate instrument flight displays that comply are not in full-time use. Therefore, consideration should be given to the functionality of the MD-17 HUD under all foreseeable operating conditions. For example, looking directly at the sun through the HUD combiner can be painful or harmful to the pilot's eyes; therefore, an alternate display of primary flight information, which complies with the applicable regulatory requirements, must be available on demand. The MD-17 is capable of displaying primary flight information on any of its four multi-function displays (MFD's). To comply with § 25.1321, the two MFD's centered in front of each pilot must be available to display instrument flight information on demand, and the other two center displays must be able to simultaneously display other essential information, such as navigation and engine indications. Selectable display functionality needs special attention in determining compliance with § 25.1301 for the MD-17 suite of displays, including HUD's and MFD's.

The installation of the HUD system must not interfere with or restrict the use of other installed equipment such as emergency oxygen masks, headsets, or microphones. HUD installations typically result in the placement of protruding equipment (e.g., projector, combiner) in the vicinity of the pilot's head and thereby provide the potential for compromising the intended function of the equipment identified above.

The HUD is capable of presenting a large amount of static and dynamic symbology, numbers, and text that can appear cluttered, difficult to interpret, and difficult to see through. Special attention should be given to the potential effects of display clutter, such as interference between moving symbols, other symbols, and alphanumeric information on display functionality, flightcrew task performance, and workload (§ 25.1523; Appendix D).

"Declutter" modes can selectively remove certain data from the display, so special attention should be given to ensuring that essential data cannot be removed, when needed to continue safe flight and landing.

- Section 25.1381a(2)(ii): "Instrument lights must be installed so that no objectionable reflections are visible to the pilot." Attention should be paid both to reflections from other sources on the HUD and those from the HUD on to windows and other displays.

Advisory Material

Advisory Circular (AC) 25-11, "Transport Category Airplane Electronic Display Systems," provides guidance and policy information regarding means to demonstrate the acceptability of electronic displays, including HUD's. All portions of AC 25-11 are applicable to demonstrate compliance for the

special conditions, except for the color unique criteria of paragraph 5. However, note that the fundamental principles specified in subparagraph 5b, Color Perception vs. Workload, do apply and should be followed with non-color means such as size, shape, and location. Although the HUD does not have color, criteria for evaluation of clutter, workload, and display perception, considering distinctive symbology features such as size, shape, and location, are applicable. Also note that, for HUD's, excessive clutter affects not only the workload and readability of the presentation, but also the pilot's ability to see the outside view and visually detect operational hazards. Also, in spite of its title, the luminance criteria of subparagraph 6b, Chromaticity and Luminance, applies to evaluation of the HUD display luminance. Unique HUD requirements for HUD brightness capability and control are specified in Special Condition No. 2(b)(2).

3. Protection From Unwanted Effects of High Intensity Radiated Fields (HIRF)

The MD-17 uses electrical and electronic systems that perform critical and essential functions. These systems include electronic displays, electronic engine controls, fly-by-wire flight controls, and others. There is no specific regulation that addresses protection requirements for these systems from HIRF. Increased power levels from ground based radio transmitters and the growing use of sensitive electrical and electronic systems to command and control airplanes have made it necessary to provide adequate protection.

Changes in technology have given rise to advanced electrical and electronic airplane systems, use of composite materials in airplane structures, and higher energy levels from radio, television, and radar transmitters. The combined effect of these developments has been an increased susceptibility of electrical and electronic systems to electromagnetic fields.

Many advanced digital systems are prone to upsets and/or damage at energy levels lower than analog systems. Digital systems also allow the location of more complex functions in fewer components. These functions were previously performed manually, electromechanically, or hydraulically. The implementation of such advanced systems has found rapid acceptance since they lower cost, crew workload, and maintenance requirements, while airplane performance and fuel efficiency are enhanced.

Propelled by the need to attain higher efficiency, industry has also proceeded to adopt composite materials for use in

airplane structures, thus reducing or replacing the use of aluminum. Due to their low conductivity properties, composite materials afford poor shielding effectiveness, further exposing electrical and electronic systems to the electromagnetic environment.

At this time, the FAA and other airworthiness authorities are unable to precisely define or control the HIRF energy level to which the airplane will be exposed in service. Therefore, to ensure that a level of safety is achieved equivalent to that intended by the current regulations, Special Condition No. 3 is proposed. This special condition would require that new electrical and electronic systems that perform critical functions be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of HIRF.

Airframe

4. Interaction of Systems and Structures

The MD-17 airplane utilizes a full-time electronic flight control system (EFCS). Pilot control commands are sent to flight control computers which condition the input signals, combine them with other sensor data indicating airplane configuration and flight condition, and apply servo position commands to the actuation systems of the control surfaces. In this way, the EFCS affects control surface actuation and therefore the airplane flight loads. Failures that occur in the EFCS may further affect flight loads, both at the time of the event and thereafter.

The current part 25 airworthiness standards were intended to account for control laws for which control surface deflection is proportional to control device deflection. They do not address any nonlinearities or other effects on control surface actuation that may be caused by the EFCS, whether fully operative or in a failure mode. Since the EFCS may affect flight loads, and therefore the structural capability of the airplane, specific regulations are needed to address these effects. Thus, Special Condition 4 is proposed.

If a failure occurs within the EFCS, the airplane may still be capable of operating within a reduced structural envelope. That is, the airplane may be able to meet the strength and flutter requirements of part 25, but at reduced factors of safety or airspeed, as applicable. This reduced structural envelope is considered acceptable provided that it is based on failure probabilities within the EFCS. Special Condition 4 provides specific structural load and aeroelastic stability

requirements with reduced factors of safety and/or airspeeds based on the probability of failure. These requirements ensure that the airplane structural design safety margins will be dependent on system reliability. The requirements proposed in Special Condition 4 also ensure that any influence of the EFCS on airplane flight loads will be accounted for when the system is fully operative.

5. Design Maneuvering Requirements for Fly-by-Wire

The MD-17 airplane utilizes a full-time electronic flight control system (EFCS). Pilot control commands are sent to flight control computers, which condition the input signals, combine them with other sensor data indicating airplane configuration and flight condition, and apply servo position commands to the actuation systems of the control surfaces. In this way, the EFCS affects control surface actuation and therefore the airplane flight loads.

The current part 25 airworthiness standards were intended to account for control laws for which control surface deflection is proportional to control device deflection. They do not address nonlinearities or other effects on control surface actuation that may be caused by the EFCS. Since the EFCS may affect flight loads, and therefore the structural capability of the airplane, specific regulations are needed to address these effects. Thus, Special Condition 5 is proposed.

Special Condition 5 differs from current requirements in that it requires that certain maneuvers be performed by actuation of the cockpit control device as opposed to the corresponding control surface. In addition, the special condition requires consideration of loads induced by the EFCS itself. These requirements ensure that any influence of the EFCS on airplane flight loads will be accounted for.

6. Limit Engine Torque Loads for Sudden Engine Stoppage

McDonnell Douglas proposes to treat the rare sudden engine stoppage condition resulting from structural failure as an ultimate load condition. Section 25.361(b)(1) specifically defines the seizure torque load, resulting from structural failure, as a limit load condition.

The limit engine torque load imposed by sudden engine stoppage due to malfunction or structural failure (such as compressor jamming) has been a specific requirement for transport category airplanes since 1957. The size, configuration, and failure modes of jet engines has changed considerably from

those envisioned by § 25.361(b) when the engine seizure requirement was first adopted. Engines are much larger and are now designed with large bypass fans capable of producing much larger torque loads if they become jammed. It is evident from service history that the frequency of occurrence of the most severe sudden engine stoppage events, resulting from structural failures, are rare.

Relative to the engine configurations that existed when the rule was developed in 1957, the present generation of engines are sufficiently different and novel to justify issuance of a special condition to establish appropriate design standards. The latest generation of jet engines are capable of producing engine seizure torque loads that are significantly higher than previous generations of engines.

The FAA is developing a new regulation and a new AC that will provide more comprehensive criteria for treating engine torque loads resulting from sudden engine stoppage. In the meantime, a special condition is needed to establish appropriate criteria for the MD-17 type design.

In order to maintain the level of safety envisioned by § 25.361(b), more comprehensive criteria are needed for the new generation of high-bypass engines. The proposed special condition would distinguish between the more common seizure events and those rare seizure events resulting from structural failures. For these more rare but severe seizure events, the proposed criteria would allow deformation in the engine supporting structure (ultimate load design) in order to absorb the higher energy associated with the high-bypass engines, while at the same time protecting the adjacent primary structure in the wing and fuselage by providing an additional safety factor.

To provide appropriate structural design criteria for the engine torque on the MD-17, Special Condition No. 6 is proposed.

Flight Characteristics

7. Flight Characteristics Compliance via Handling Qualities Rating Method

The MD-17 will have an Electronic Flight Control System (EFCS). This system will provide an electronic interface between the pilot's flight controls and the flight control surfaces (for both normal and failure states), generating the actual surface commands that provide for stability augmentation and control about all three airplane axes. Because EFCS technology has outpaced existing regulations (written essentially for unaugmented airplanes,

with provision for limited ON/OFF augmentation), a suitable special condition is needed to aid in the certification of flight characteristics.

In addition, service history and certification experience have shown that EFCS-type airplanes and others may be susceptible to airplane-pilot coupling (A-PC) tendencies. Pilot induced oscillations can be considered a subset of A-PC problems. An example of these problems are control systems that are rate or position limited during some pilot commands in which the pilot has no feedback through the controller.

The proposed special condition provides a means by which flight characteristics ("satisfactory," "safe flight and landing," etc.) can be evaluated and compliance found. The Handling Qualities Rating System (HQRS) was developed for airplanes with control systems having similar functions and is employed to aid in the evaluation of the following:

- For all EFCS/airplane failure states not shown to be extremely improbable, and where the envelope (task) and atmospheric disturbance probabilities are each 1.
- For all combinations of failures, atmospheric disturbance level, and flight envelope that yield flight conditions expected to occur more frequently than extremely improbable.
- For any other flight condition or characteristic where part 25 proves to be inadequate for proper assessment of unique MD-17 flight characteristics.

The HQRS provides a systematic approach to handling qualities assessment. It is not intended to dictate program size or need for a fixed number of pilots to achieve multiple opinions. The airplane design itself and success in defining critical failure combinations from the many reviewed in systems safety assessments would dictate the scope of any HQRS application.

Handling qualities terms, principles, and relationships familiar to the aviation community have been used to formulate the HQRS. For example, similarity has been established between the well-known Cooper-Harper rating scale and the proposed FAA three-part rating system. This approach is derived, in part, from work on flying qualities of highly augmented/relaxed static stability airplanes, namely regulatory and flight test guide requirements.

In addition, experience has shown that compliance with only the qualitative, open-loop (pilot-out-of-the-loop) requirements does not guarantee that the required levels of flying qualities are achieved. There must be an evaluation by certification pilots conducting high gain (wide band width) closed-loop (pilot-in-the-loop) tasks, to

ensure that the airplane demonstrates the flying qualities required by §§ 25.143(a) and (b) and to minimize the hazards associated with encountering adverse A-PC tendencies in service.

For the most part, these tasks must be performed in actual flight. For conditions that are considered too dangerous to attempt in actual flight (i.e., certain flight conditions outside of the operational flight envelope, flight in severe atmospheric disturbances, flight with certain failure states, etc.), the closed loop evaluation tasks may be performed on a validated high fidelity simulator.

Special Condition No. 7 is proposed for the MD-17 to aid in the certification of flight characteristics. An acceptable means of compliance with this special condition is provided in AC 25-7A, "Flight Test Guide for the Certification of Transport Category Airplanes."

8. *Static Longitudinal Stability*

Like other airplanes with similar highly augmented electronic flight control systems, the MD-17 does not literally comply with the requirements prescribed by § 25.173 for static longitudinal stability. In one control mode of the electronic flight control system, no control force is needed to maintain a speed change from the trimmed condition. Although this operating system mode provides quick, accurate pitch response with minimal pilot effort, it does not comply with the literal requirements for static longitudinal stability.

Static longitudinal stability has been required in accordance with part 25 for the following reasons:

- Provides additional speed change cues to the pilot through control force changes.
- Ensures that short periods of unattended operation do not result in any significant changes in attitude, airspeed, or load factor.
- Provides predictable pitch response.
- Provides acceptable level of pilot attention (workload) to attain and maintain trim speed and altitude.
- Provides gust stability.

In order to achieve an equivalent level of safety with part 25, the MD-17 should meet the intent of these principles, even though it may not comply with the literal terms of § 25.173. Special Condition No. 8 is proposed to ensure that the MD-17 has suitable static longitudinal stability in any condition normally encountered in service. The HQRS prescribed by Special Condition No. 7 may be used to make this assessment.

9. *Static Lateral-Directional Stability*

Because of the MD-17 roll axis design feature in which the commanded roll

rate is proportional to roll stick position, aileron control movements and forces do not comply with § 25.177 as they are not proportional to angle of sideslip. This feature is active during all flight phases and conditions, except when the flap/slat handle is at or greater than the 1/2 detent setting, or during a rudder pedal input.

Dihedral effect (as indicated by aileron forces proportional to the angle of sideslip) has been required in accordance with § 25.177 for the following reasons:

- In the event that primary lateral control is lost, roll can be produced by use of the rudder.
- In an airplane with positive dihedral effect, the bank angle and the lateral control forces required to hold heading provide positive indication of an inadvertent sideslip.
- It can have a beneficial effect on spiral stability.
- In the event of an engine failure, the roll due to the asymmetric yawing moment contributes to the ease of identifying the failed engine.

In order to achieve an equivalent level of safety with part 25, the MD-17 should meet the intent of these principles even though it may not comply with the literal terms of § 25.177.

In lieu of showing compliance with § 25.177, Special Condition No. 9 is proposed to ensure that the MD-17 has suitable static lateral-directional stability in any condition normally encountered in service. The HQRS prescribed by Special Condition No. 7 may be used to make this assessment.

10. *Control Surface Awareness*

With an electronic flight control system and no direct coupling from cockpit controller to control surface, the pilot may not be aware of the actual surface position utilized to fulfill the requested demand. Some unusual flight condition, arising from atmospheric conditions and/or airplane or engine failures, may result in full, or near full, surface deflection. Unless the flightcrew is made aware of excessive deflection or impending control surface limiting, piloted or auto-flight system control of the airplane might be inadvertently continued in such a manner as to cause airplane loss of control or other unsafe stability or performance characteristics.

In airplanes with electronic flight control systems, there may not always be a direct correlation between pilot control position and the associated airplane control surface position. Under certain circumstances, a commanded maneuver that may not involve a large control input may nevertheless require a large control surface movement,

possibly encroaching on a control surface or actuation system limit without the flightcrew's knowledge. This situation can arise in both manually piloted and autopilot flight, and may be further exacerbated on airplanes where the pilot controls are not back-driven during autopilot system operation.

As a result of these concerns, a special condition is proposed for the MD-17. Special Condition No. 10 proposes a requirement that suitable flight control position annunciation be provided to the flightcrew when a flight condition exists in which near full surface authority (not crew-commanded) is being utilized. Suitability of such a display or alerting must take into account that some pilot-demanded maneuvers are necessarily associated with intended full performance, which may saturate the surface. Therefore, simple alerting systems, which would function in both intended or unexpected control-limiting situations, must be properly balanced between needed crew awareness and nuisance factors. A monitoring system that compares airplane motion, surface deflection, and pilot demand could be useful for eliminating nuisance alerting.

Approach and Landing Limitations

11. Steep Approach Air Distance

The MD-17 has a number of design features to support steep approach flight path capability with precision landing. McDonnell Douglas proposes to certify MD-17 landing performance for both conventional 3-degree approach glideslope operation and steep approach operation.

Novel and unique features on the MD-17 provide for increased touchdown dispersion accuracy during steep approach operations relative to conventional transport category airplanes. McDonnell Douglas has proposed an alternative method for defining the airborne portion of the landing distance in lieu of the demonstrated distance from a 50-foot height to touchdown. A special condition is proposed to redefine the air distance portion of the MD-17 landing distance for steep approach operations conducted under a proposed Special Federal Aviation Regulation (SFAR), "Requirements for operational approval of special approaches to short field landings for the McDonnell Douglas Model MD-17 power-augmented-lift airplane," currently being developed by the FAA.

Steep approach operations are intended to minimize the air run to help achieve short field performance. Steep

approach for the MD-17 is defined as an approach flight path angle not to exceed 5 degrees, with an approach rate of descent not to exceed 1,000 feet per minute. For the landing reference speeds used by the MD-17, almost all operations are limited by the 1,000 feet per minute constraint, which yields approach flight path angles predominantly in the range from 4 to 4.8 degrees.

Several design features on the MD-17 are intended to enable the airplane to safely fly steep approaches. First, the landing gear is designed to withstand touchdown rates of descent of up to 12.5 feet per second for weights up to 435,800 pounds and 11 feet per second for weights up to the maximum MD-17 landing weight of 491,900 pounds. Second, the high lift system with externally blown flaps allows operation at relatively low landing reference speeds which, when combined with the MD-17 lift/drag characteristics, allows this airplane to be flown using a backside control technique. Third, a spoiler function linking spoilers and throttle movement provides much more precise throttle control. Fourth, the MD-17 is equipped with a HUD, which displays the airspeed and the flight path vector, and a pilot-selectable flight path marker to indicate the desired flight path. The HUD assists the pilot in precisely controlling the airplane flight path to an aim point on the runway. With no pitch flare needed, the aim point is very close to the actual touchdown point. Considered together, these MD-17 features allow pilots to fly steep approaches and accurate touchdowns near the aim point, while maintaining control over speed and the rate of descent at touchdown.

The backside control technique mentioned above uses thrust changes to primarily affect flight path angle, and pitch changes to primarily affect airspeed. As with all airplanes, there is some control coupling such that any control input will affect both flight path angle and airspeed, but the coupling is minimized for the low speed backside operation used by the MD-17. Reduced control coupling leads to greater

precision in airspeed and flight path control. The backside control technique allows throttle inputs to be used to control vertical speed all the way to touchdown instead of the "pitch flare" maneuver used on other airplanes.

The throttle-spoiler interconnect feature of the MD-17 design allows spoiler motion to simulate the effect of immediate engine response to throttle movement. The spoilers are nominally biased in the up direction during steady-state operation. When the throttles are moved, the spoilers move in the direction necessary to provide essentially the same airplane response as an immediate thrust change. As the engine responds, the spoilers, over time, return to their original (biased) positions. This feature eliminates the lag often associated with thrust control.

Over 175 steep approach landings were performed during C-17 testing to demonstrate the precision landing characteristics. All of these runs were made using an operational technique performed by pilots with only three practice runs to gain familiarity with the technique. These approaches were conducted to establish that no exceptional piloting skill or training was required to achieve the tested performance levels. During the demonstrations, only a limited portion of the flight manual allowable wind and temperature conditions were accounted for. The purpose of the testing was to demonstrate that the precision approach accuracy could yield touchdowns with a ± 2 standard deviation (σ) band of less than 500 feet relative to the mean touchdown point, while also maintaining an acceptable rate of descent at touchdown.

The FAA notes that McDonnell Douglas proposes two distinct types of landing operations for the MD-17: (1) conventional landings that will be conducted in accordance with existing part 25 and 121 regulations; and (2) special approaches to short field landings that will be conducted in accordance with a proposed SFAR (to be published at a later date) and associated special conditions. The proposed SFAR would address additional equipment,

training, and operating requirements associated with conducting special approaches to short field landings. McDonnell Douglas intends to provide steep approach capability (allowing operators to seek steep approach approval) for both types of landing operations.

For conventional landings, the steep approach air distance would be determined by using the existing applicable type certification and operating requirements. This proposed special condition for steep approach air distance would only apply to special approaches to short field landings conducted in accordance with the proposed SFAR and Special Condition No. 12, "Landing Distances for Special Approaches to Short Field Landings." It addresses only the determination of landing distance to be used in conjunction with those operations and does not imply approval to conduct steep approach operations.

For MD-17 steep approach operations conducted under the proposed SFAR, Special Condition No. 11 is proposed in conjunction with proposed Special Condition No. 12, in lieu of § 25.125(a).

12. Landing Distances for Special Approaches to Short Field Landings

As noted in the discussion of Special Condition No. 11, McDonnell Douglas proposes two distinct types of landing operations for the MD-17: (1) conventional landings that will be conducted in accordance with existing part 25 and 121 regulations, and (2) special approaches to short field landings that will be conducted in accordance with a proposed SFAR and associated special conditions.

The operational landing distance margin provided by part 121 takes into account steady-state variables that are not included in the part 25 landing distances, differences in operational procedures and techniques from those used in determining the part 25 landing distances, non steady-state variables, and differences in the conditions forecast at dispatch and those existing at the time of landing. Examples of each of these categories include:

Steady-state variables	Non steady-state variables	Operations vs. Flight Test	Actual vs. Forecast conditions
Runway slope	Wind gusts/turbulence	Flare technique	Runway or direction (affecting slope).
Temperature	Flight path deviations	Time to activate deceleration devices.	Airplane weight.
Runway surface condition (dry, wet, icy, texture).	.....	Flight path angle	Approach speed.
Brake/tire condition .....	.....	Rate of descent at touchdown	Environmental conditions (e.g., temperature, wind, pressure altitude).
Speed additives .....	.....	Approach/touchdown speed	Engine failure.

Steady-state variables	Non steady-state variables	Operations vs. Flight Test	Actual vs. Forecast conditions
Crosswinds	Height at threshold Speed control.	

Note: This is not intended to be an exhaustive list of variables to be considered.

In order to allow the part 121 operational landing distance margins to be reduced as proposed in the SFAR for special approaches to short field landings, additional type certification requirements are needed. In addition to what is currently required by § 25.125, the landing distances to be used under the proposed SFAR would be required to include the effects of runway slope and ambient temperature. Landing distances on a wet runway would also have to be determined in a manner acceptable to the FAA. In addition, during the flight testing to determine the landing distances, the average touchdown rate of descent and the approach flight path angle would be limited to no greater than 4 feet per second and -3 degrees, respectively.

The applicant would be required to establish operating procedures for use in service that are consistent with those used to establish the performance data and can be executed by crews of average skill. The applicant would be required to include, as applicable, procedures associated with speed additives for turbulence and gusts for approaches with all engines operating and with an engine failure on final approach, and the use of thrust reversers on all operative engines during the landing rollout.

The operational landing distance margins applicable to the MD-17, and additional operational considerations associated with the use of these reduced margins (e.g., runway markings, meteorological conditions, and flightcrew procedures and training), are covered in the proposed SFAR.

Although this special condition will explicitly take into account many of the variables currently accounted for by the part 121 operational landing distance margins, some operational landing distance margin is still necessary to account for variables that remain. For example, because § 121.195(d) specifies the maximum takeoff weight for the conditions forecast at the time of landing (including environmental conditions such as temperature and pressure altitude, airport conditions such as runway and direction, and airplane conditions such as fuel burnoff and approach speed), potential differences in the forecast and actual conditions should be taken into account. Other operational issues that should be considered in the operational

landing distance margins include piloting technique and time to activate deceleration means, unsteady winds and crosswinds, and airspeed and flight path deviations. Therefore, the proposed SFAR will still contain operational landing distance margins, although reduced from those margins currently required by §§ 121.195 and 121.197, that would be applied to the landing distance determined in accordance with this proposed special condition.

The proposed Special Condition No. 12 provides the additional requirements noted above that the FAA considers necessary to allow operational use of the landing distance margins prescribed in the proposed SFAR. Note that the determination of landing distances in accordance with this proposed special condition does not constitute operational approval to use landing distance margins reduced from those specified in part 121. Operational approval to use the reduced landing distance margins must be obtained in accordance with the proposed SFAR.

13. Thrust for Landing Climb

Section 25.119(a) states that the airplane must achieve a 3.2 percent climb gradient after initiating a thrust increase from the minimum flight idle position. The thrust allowed is that thrust attained within eight seconds of engine spool-up time from the initiation of thrust lever movement. Because of the power-augmented-lift design, the MD-17 thrust required for a stabilized approach is significantly above a conventional turbojet minimum flight idle setting, and thrust would not be reduced to idle during the approach.

Section 25.119(a) was written to assure that the flightcrew would have sufficient airplane performance to safely transition to a climb during a go-around in the landing configuration. The rule assumes that the approach power setting may be as low as the flight idle position. The MD-17 power-augmented-lift design requires a significant approach thrust level during the approach to maintain the approach flight path. Unlike conventional transport category airplanes, thrust reductions during the approach are not necessary to maintain or recover the flight path. The MD-17 operational procedures will discourage use of thrust reduction to make down flight path adjustments during approach. The direct lift control (DLC)

feature provides a down path angle control for large flight path adjustments without throttle movement.

To improve the control response to throttle movement, the MD-17 uses a spoiler function where the spoilers are linked with the throttles to simulate the effect of instantaneous engine response to throttle movement. The throttle-spoiler function is a short-term response; as the engine responds to throttle movement, the spoilers return to their original positions. The approach is flown with a non-zero spoiler bias to allow spoilers to react upward or downward in response to throttle movement. This function provides instantaneous response to control input and allows throttle movement to be minimized.

During the segment from 50 feet to touchdown, the MD-17 uses a backside control technique that does not require either thrust to be reduced to an idle power setting or the use of a pitch-up flare maneuver prior to touchdown. With the backside control technique, airplane pitch attitude is used to control airspeed, and thrust is used to control flight path angle.

In lieu of compliance with § 25.119(a), Special Condition No. 13 is proposed. The thrust for a stabilized approach, including an appropriate margin for operational safety, would be used as a basis for determining the thrust available for the landing climb requirement. In the proposed special condition, the initial thrust level at the start of the 8-second spool-up time would be the thrust for a stabilized approach at a flight path angle 2 degrees steeper than the desired flight path angle. This thrust level would account for thrust variations during the approach and conservatively represent the initial thrust level.

This proposed special condition would be applicable only when the following design features are present:

- At no time in the landing configuration should the thrust be reduced to idle.
- A backside control technique must be used such that a thrust reduction is not used to reduce the rate of descent at touchdown.
- Procedures must be provided in the Airplane Flight Manual to define the proper technique for flight path angle adjustments during approach and landing.
- The airplane must have DLC spoilers or other aerodynamic means of making down path angle adjustments without thrust reduction.

- Throttle movement should activate a short-term aerodynamic surface motion in order to provide a high level of control feedback and to avoid excessive throttle adjustments.
- The airplane and engine state (e.g., airplane weight and engine bleed configuration) and operating conditions (e.g., pressure altitude and temperature) should be the most critical combination relative to the thrust level used to show compliance with this special condition.

Applicability

As discussed above, these special conditions are applicable to the McDonnell Douglas Model MD-17 series airplanes. Should McDonnell Douglas apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, the special conditions would apply to that model as well under the provisions of § 21.101(a)(1).

Conclusion

This action affects only certain novel or unusual design features on one model series of airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval to use these features on the airplane.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for McDonnell Douglas Model MD-17 series airplanes:

1. Stall Speeds and Minimum Operating Speeds

(a) In addition to the general definitions, abbreviations, and symbols provided in §§ 1.1 and 1.2, this special condition relies on the following additional definitions, abbreviations, and symbols:

“Reference flight path angle means -3 degrees for a normal approach, and the shallower of -5 degrees or the flight path angle resulting from a 1000 feet per minute rate of descent for a steep approach.”

“ V_{SR} means reference stall speed.”

“ V_{SRPWR} means power-on reference stall speed.”

“ V_{SRO} means reference stall speed in the landing configuration.”

“ V_{SRPWR} means power-on reference stall speed in the landing configuration.”

“ V_{SR1} means reference stall speed in a specific configuration.”

“ V_{SR1PWR} means power-on reference stall speed in a specific configuration.”

“ V_{REF} means reference landing speed.”

“ V_{FTO} means final takeoff speed.”

“ V_{SW} means speed at which onset of natural or artificial stall warning occurs.”

(b) In lieu of compliance with § 25.103, the following applies:

(1) The reference stall speed, V_{SR} , is a calibrated airspeed as defined in paragraph (3) below. V_{SR} is determined with—

(i) Engines idling, or, if that resultant thrust causes an appreciable decrease in stalling speed, not more than zero thrust at the stall speed;

(ii) The airplane in other respects (such as flaps and landing gear) in the condition existing in the test in which V_{SR} is being used;

(iii) The weight used when V_{SR} is being used as a factor to determine compliance with a required performance standard;

(iv) The center of gravity position that results in the highest value of reference stall speed; and

(v) The airplane trimmed for straight flight at a speed selected by the applicant, but not less than 1.13 V_{SR} and not greater than 1.30 V_{SR} .

(2) Starting from the stabilized trim condition, apply elevator control to decelerate the airplane so that the speed reduction does not exceed one knot per second.

(3) The reference stall speed, V_{SR} , may not be less than a 1-g stall speed, which is a calibrated airspeed determined in the stalling maneuver and expressed as:

$$V_{SR} = V_{CLMAX} / \sqrt{n_{ZW}}$$

Where:

V_{CLMAX} = Speed occurring when lift coefficient is first a maximum; and
 n_{ZW} = Flight path normal load factor (not greater than 1.0) at V_{CLMAX} .

(4) The power-on reference stall speed, V_{SRPWR} , is a calibrated airspeed as defined in paragraph (6) below. V_{SRPWR} is determined with—

(i) The critical engine inoperative and the power or thrust setting on the remaining engines at the minimum power or thrust level appropriate for the flight condition used to show compliance with a required performance standard;

(ii) The airplane in other respects (such as flaps and landing gear) in the condition existing in the test in which V_{SRPWR} is being used;

(iii) The weight used when V_{SRPWR} is being used as a factor to determine

compliance with a required performance standard;

(iv) The center of gravity position that results in the highest value of the power-on reference stall speed; and

(v) The airplane trimmed for straight flight at a speed selected by the applicant, but not less than 1.18 V_{SRPWR} and not greater than 1.36 V_{SRPWR} .

(5) Starting from the stabilized trim condition, apply elevator control to decelerate the airplane so that the speed reduction does not exceed one knot per second.

(6) The power-on reference stall speed, V_{SRPWR} , may not be less than a 1-g power-on stall speed, which is a calibrated airspeed determined in the stalling maneuver and expressed as:

$$V_{SRPWR} = V_{CLMAX} / \sqrt{n_{ZW}}$$

Where:

V_{CLMAX} = Speed occurring when lift coefficient is first a maximum; and
 n_{ZW} = Flight path normal load factor (not greater than 1.0) at V_{CLMAX} .

(c) In lieu of compliance with § 25.107(b), the following applies: V_{2MIN} , in terms of calibrated airspeed, may not be less than—

(1) 1.03 V_{SR} ;

(2) 1.18 V_{SRPWR} , with the operative engines at the minimum thrust or power existing at any point in the takeoff path; and

(3) 1.10 times V_{MC} established under § 25.149.

(d) In addition to compliance with §§ 25.107(c)(1) and (c)(2), the following also applies: A speed that provides the maneuvering capability specified in paragraph (k) below.

(e) In addition to compliance with §§ 25.107(a) through (f), the following also applies: V_{FTO} , in terms of calibrated airspeed, must be selected by the applicant to provide at least the gradient of climb required by paragraph (h) below, but may not be less than—

(1) 1.18 V_{SR} ; and

(2) A speed that provides the maneuvering capability specified in paragraph (k) below.

(f) In lieu of compliance with § 25.111(a), the following applies: The takeoff path extends from a standing start to a point in the takeoff at which the airplane is 1,500 feet above the takeoff surface, or at which the transition from the takeoff to the en route configuration is completed and V_{FTO} is reached, whichever point is higher. In addition—

(1) The takeoff path must be based on the procedures prescribed in § 25.101(f);

(2) The airplane must be accelerated on the ground to V_{EF} , at which point the critical engine must be made inoperative and remain inoperative for the rest of the takeoff; and

(3) After reaching V_{EF} , the airplane must be accelerated to V_2 .

(g) In lieu of compliance with § 25.119 (b), the following applies: A climb speed of not more than V_{REF} .

(h) In lieu of compliance with § 25.121(c), the following applies:

Final takeoff. In the en route configuration at the end of the takeoff path determined in accordance with § 25.111, the steady gradient of climb may not be less than 1.2 percent for two-engine airplanes, 1.5 percent for three-engine airplanes, and 1.7 percent for four engine airplanes, at V_{FTO} and with—

(1) The critical engine inoperative and the remaining engines at the available maximum continuous power or thrust; and

(2) The weight equal to the weight existing at the end of the takeoff path, determined under § 25.111.

(i) In lieu of compliance with § 25.121(d), the following applies:

Approach. In a configuration corresponding to the normal all-engines-

operating procedure in which $V_{SR_{PWR}}$ for this configuration, with the operative engines at the minimum thrust or power existing at any point in the go-around, does not exceed 110 percent of the $V_{SR_{PWR}}$ for the related all-engines-operating landing configuration, with the operative engines at the power or thrust setting for approach at the reference flight path angle at V_{REF} , the steady gradient of climb may not be less than 2.7 percent with—

(1) The critical engine inoperative, the remaining engines at the go-around power or thrust setting;

(2) The maximum landing weight;

(3) A climb speed established in connection with normal landing procedures, but not more than $1.4 V_{SR_{PWR}}$ with the operative engines at the minimum power or thrust setting existing at any point in the go-around; and

(4) The landing gear retracted.

(j) In lieu of compliance with § 25.125(a)(2), the following applies: A stabilized approach, with a calibrated airspeed of not less than V_{REF} or V_{MCL} , whichever is greater, must be maintained down to the 50 foot height. V_{REF} may not be less than—

(1) $1.03 V_{SR0}$;

(2) $1.20 V_{SR0_{PWR}}$ with the operative engines at the power or thrust setting for approach at the reference flight path angle;

(3) The airspeed that provides an angle-of-attack margin to stall for not less than a 20 knot equivalent airspeed vertical gust with all engines operating at the power or thrust setting for approach at the reference flight path angle;

(4) The airspeed that provides an angle-of-attack margin to stall for not less than a 15 knot equivalent airspeed vertical gust with the critical engine inoperative at the power or thrust setting for approach at the reference flight path angle; and

(5) A speed that provides the maneuvering capability specified in paragraph (k) below.

(k) In addition to compliance with § 25.143, the following applies: The maneuvering capabilities in a constant speed coordinated turn, as specified in the table below, must be free of stall warning or other characteristics that might interfere with normal maneuvering.

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CONFIGURATION	SPEED	MANEUVERING BANK ANGLE	THRUST REPRESENTATIVE OF
TAKEOFF	V_2	30°	ASYMMETRIC (1)WAT-LIMITED
TAKEOFF	(2) $V_2 + XX$	40°	ALL-ENGINES-OPERATING (3)CLIMB
EN ROUTE	V_{FTO}	40°	ASYMMETRIC (1)WAT-LIMITED
LANDING	V_{REF}	40°	SYMMETRIC FOR APPROACH AT THE REFERENCE APPROACH (4)FLIGHT PATH ANGLE

(1) A combination of Weight, Altitude and Temperature (WAT) such that the thrust or power setting produces the minimum climb gradient specified in § 25.121 for the flight condition.

(2) Airspeed approved for all-engines-operating initial climb.

(3) That thrust or power setting which, in the event of failure of the critical engine and without any crew action to adjust the thrust or power of the remaining engines, would result in the thrust or power specified for the takeoff condition at V_2 , or any lesser thrust or power setting that is used for all-engines-operating initial climb procedures.

(4) Thrust may be adjusted during the maneuver to maintain the reference approach flight path angle.

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(l) In lieu of compliance with § 25.145(a), the following applies: It must be possible at any speed between the trim speed prescribed in paragraph (b)(1)(v), or (b)(4)(v), of this special condition for flaps extended configurations, and the minimum speed obtained in conducting a stalling maneuver, to pitch the nose downward so that the acceleration to this selected trim speed is prompt with—

(1) The airplane trimmed at the speed prescribed in paragraph (b)(1)(v) of this special condition for flaps retracted configurations, or as prescribed in paragraph (b)(4)(v) of this special condition for flaps extended configurations;

(2) The landing gear extended;

(3) The wing flaps—

(i) retracted, and

(ii) extended; and

(4) Power—

(i) off with the flaps retracted and, with the flaps extended, with all engines operating at the minimum power or thrust level consistent with

that used to determine the power-on reference stall speeds; and

(ii) at maximum continuous power on the engines.

(m) In lieu of compliance with § 25.145(b)(2), the following applies: Repeat paragraph (b)(1) of this section, except begin with the flaps fully extended and all engines at the minimum power or thrust level consistent with that used to determine the power-on reference stall speed for that flap position, and then retract the flaps as rapidly as possible.

(n) In lieu of compliance with § 25.145(b)(5), the following applies: Repeat paragraph (b)(4) of this section, except with the flaps extended and all engines at the minimum power or thrust level consistent with that used to determine the reference power-on stall speed.

(o) In lieu of compliance with § 25.145(b)(6), the following applies: With all engines at the minimum power or thrust level consistent with that used to determine the reference power-on stall speed, flaps extended, and the airplane trimmed at $1.3 V_{SR1PWR}$, obtain

and maintain airspeeds between V_{SW} , and either $1.6 V_{SR1PWR}$ or V_{FE} , whichever is lower.

(p) In lieu of compliance with § 25.161(c)(2), the following applies: A glide with the landing gear extended, the most unfavorable center of gravity position approved for landing with the maximum landing weight, and the most unfavorable center of gravity position approved for landing, regardless of weight with the wing flaps—

(1) retracted with power off at a speed of $1.3 V_{SR1}$, and

(2) extended with all engines at the minimum power or thrust level consistent with that used to determine the power-on reference stall speed at a speed of $1.3 V_{SR1PWR}$.

(q) In lieu of compliance with § 25.175(d)(4), the following applies: All engines at the minimum power or thrust level consistent with that used to determine the power-on reference stall speed.

(r) In lieu of compliance with § 25.175(d)(5), the following applies: The airplane trimmed at $1.3 V_{SR0PWR}$.

(s) In lieu of the speeds given in the following part 25 requirements, comply with the speeds as follows:

§§ 25.145(b)(1) and (b)(4), $1.3 V_{SR1}$, in lieu of $1.4 V_{S1}$.

§ 25.145(b)(1), 30 percent, in lieu of 40 percent.

§ 25.145(b)(1), power-on reference stall speed, in lieu of stalling speed.

§ 25.145(c), $1.08 V_{SR1}$, in lieu of $1.1 V_{S1}$.

§ 25.145(c), $1.18 V_{SR1PWR}$, in lieu of $1.2 V_{S1}$.

§ 25.147(a), (a)(2), (c), and (d), $1.3 V_{SR1}$, in lieu of $1.4 V_{S1}$.

§ 25.149(c), $1.13 V_{SR}$, in lieu of $1.2 V_S$.

§ 25.161(b), (c)(1), and (c)(2), $1.3 V_{SR1}$, or $1.3 V_{SR1PWR}$ for flaps extended configurations, in lieu of $1.4 V_{S1}$.

§ 25.161(c)(3), $1.3 V_{SR1}$, in lieu of the first instance of $1.4 V_{S1}$, and $1.3 V_{SR1PWR}$, in lieu of the second instance of $1.4 V_{S1}$.

§ 25.161(d), $1.3 V_{SR1}$ in lieu of $1.4 V_{S1}$.

§ 25.161(e)(3), $0.013 V_{SR0^2}$, in lieu of $0.013 V_{S0^2}$.

§ 25.175(a)(2), (b)(1), (b)(2), and (b)(3), $1.3 V_{SR1}$, in lieu of $1.4 V_{S1}$.

§ 25.175(b)(2)(ii), $(V_{MO} + 1.3 V_{SR1})/2$, in lieu of $V_{MO} + 1.4 V_{S1}/2$.

§ 25.175(c), V_{SW} and $1.7 V_{SR1PWR}$, in lieu of $1.1 V_{S1}$ and $1.8 V_{S1}$.

§ 25.175(c)(4), $1.3 V_{SR1PWR}$, in lieu of $1.4 V_{S1}$.

§ 25.175(d), V_{SW} and $1.7 V_{SR0PWR}$, in lieu of $1.1 V_{S0}$ and $1.3 V_{S0}$.

§ 25.177(c), $1.13 V_{SR1}$, or $1.18 V_{SR1PWR}$ for flaps extended configurations, in lieu of $1.2 V_{S1}$.

§ 25.181(a) and (b), $1.13 V_{SR1}$, or $1.18 V_{SR1PWR}$ for flaps extended configurations, in lieu of $1.2 V_{S1}$.

§ 25.201(a)(2), $1.5 V_{SR1PWR}$ (where V_{SR1PWR} corresponds to the power-on reference stall speed with flaps in the approach position, the landing gear retracted, and maximum landing weight), in lieu of $1.6 V_{S1}$ (where V_{S1} corresponds to the stalling speed with flaps in the approach position, the landing gear retracted, and maximum landing weight).

(t) In addition to compliance with §§ 25.201(a)(1) and (a)(2), the following also applies: The critical engine inoperative and the power or thrust setting on the remaining engines at the minimum power or thrust level appropriate for the flight condition used to show compliance with a required performance standard.

(u) In lieu of compliance with § 25.207(b), the following applies: The warning may be furnished either through the inherent aerodynamic qualities of the airplane or by a device that will give clearly distinguishable indications under expected conditions of flight. However, a visual stall warning device that requires the attention of the

crew within the cockpit is not acceptable by itself. If a warning device is used, it must provide a warning in each of the airplane configurations prescribed in paragraph (a) of this section at the speed prescribed in paragraph (v)(1) and (2) below.

(v) In lieu of compliance with § 25.207(c), the following applies:

(1) In each normal configuration with the flaps retracted, when the speed is reduced at rates not exceeding one knot per second, stall warning must begin at a speed, V_{SW} , exceeding the speed at which the stall is identified in accordance with § 25.201(d) by not less than five knots or five percent, whichever is greater. Once initiated, stall warning must continue until the angle of attack is reduced to approximately that at which stall warning began.

(2) In addition to the requirement of paragraph (v)(1) above, when the speed is reduced at rates not exceeding one knot per second, in straight flight with engines idling and at the center of gravity position specified in paragraph (b)(1)(iv) above, V_{SW} , in each normal configuration with the flaps retracted, must exceed V_{SR} by not less than three knots or three percent, whichever is greater.

(3) In each normal configuration with the flaps extended, when the speed is reduced at rates not exceeding one knot per second, stall warning must begin at a speed, V_{SW} , exceeding the speed at which the stall is identified in accordance with § 25.201(d) by not less than five knots or five percent, whichever is greater. Once initiated, stall warning must continue until the angle of attack is reduced to approximately that at which stall warning began.

(4) In addition to the requirement of paragraph (v)(3) above, when the speed is reduced at rates not exceeding one knot per second, in straight flight with the critical engine inoperative and the power or thrust setting on the remaining engines at the minimum power or thrust level appropriate for the flight condition used to show compliance with a required performance standard, and at the center of gravity position specified in paragraph (b)(4)(i) above, V_{SW} , in each normal configuration with the flaps extended, must exceed V_{SRPWR} by not less than three knots or three percent, whichever is greater.

(5) In slow-down turns with at least 1.5g load factor normal to the flight path and airspeed deceleration rates greater than 2 knots per second, with the flaps and landing gear in any normal position, the stall warning margin must be sufficient to allow the pilot to

prevent stalling (as defined in § 25.201(d)) when recovery is initiated not less than one second after the onset of stall warning. Compliance with this requirement must be demonstrated with—

(i) The airplane trimmed for straight flight at a speed of $1.3 V_{SR}$ with the flaps retracted or $1.3 V_{SRPWR}$ with the flaps extended; and

(ii) The power or thrust necessary to maintain level flight at $1.3 V_{SR}$ with the flaps retracted or $1.3 V_{SRPWR}$ with the flaps extended.

(w) In addition to compliance with § 25.207(a) and paragraphs (u) and (v) above, the following applies: Stall warning must also be provided in each abnormal configuration of the high lift devices likely to be used in flight following system failures (including all configurations covered by Airplane Flight Manual procedures).

(x) In lieu of the speeds given in §§ 25.233(a) and 25.237(a), comply with speeds as follows: $0.2 V_{SR0PWR}$ in lieu of $0.2 V_{S0}$.

(y) In lieu of the definition of V in § 25.735(f)(2), the following apply:

$$V = V_{REF}/1.3$$

V_{REF} = Airplane steady landing approach speed, in knots, at the maximum design landing weight and in the landing configuration at sea level.

(z) In lieu of compliance with § 25.735(g), the following applies: The minimum speed rating of each main wheel-brake assembly (that is, the initial speed used in the dynamometer tests) may not be more than the V used in the determination of kinetic energy in accordance with paragraph (f) of this section, assuming that the test procedures for wheel-brake assemblies involve a specified rate of deceleration, and, therefore, for the same amount of kinetic energy, the rate of energy absorption (the power absorbing ability of the brake) varies inversely with the initial speed.

(aa) In lieu of the speeds given in the following part 25 requirements, comply with the speeds as follows:

§ 25.773(b)(1)(i), $1.5 V_{SR1}$, in lieu of $1.6 V_{S1}$.

§ 25.1001(c)(1) and (c)(3), $1.3 V_{SR1}$, in lieu of $1.4 V_{S1}$.

§ 25.1323(c)(1), $1.23 V_{SR1}$, in lieu of $1.3 V_{S1}$.

§ 25.1323(c)(2), $1.20 V_{SR0PWR}$, in lieu of $1.3 V_{S0}$.

§ 25.1325(e), $1.20 V_{SR0PWR}$, in lieu of $1.3 V_{S0}$, and $1.7 V_{SR1}$, in lieu of $1.8 V_{S1}$.

2. Head-up Display Used as a Primary Flight Display

(a) Display Requirements.

(1) The HUD must provide information necessary to enable rapid

pilot interpretation of the airplane's flight state and position during all phases of flight. This information shall enable the flightcrew to manually control the airplane and monitor the performance of the automatic flight control system. The HUD display shall enable manual airplane control and including guidance, if necessary, during an engine failure during any phase of flight. The monochrome HUD must equivalently perform the intended function of conventional color primary flight instruments and utilize display features that compensate for the lack of color. Operational acceptability of the HUD system for use while manually controlling the airplane shall be demonstrated and evaluated by the FAA. This task-oriented demonstration will evaluate crew workload and pilot compensation for normal, abnormal, and emergency operations, with single and multiple failures not shown to be extremely improbable by the system safety analysis, and is extended to all HUD display formats, unless use of specific formats is prohibited for specific phases of flight.

(2) The current mode of the flight guidance/automatic flight control system shall be clearly annunciated in the HUD, unless it is displayed elsewhere in close proximity to the HUD field of view and shown to be equivalently conspicuous. Likewise, other essential information and alerts that are related to displayed information and may require immediate pilot action must be displayed for instant recognition. Such information, depending on the phase of flight, includes malfunctions of primary data sources, guidance and control, and excessive deviations that require a go-around maneuver.

(3) If a windshear detection system or a traffic alert and collision avoidance system (TCAS) is installed, the guidance will be provided on the HUD. When the ground proximity warning system detects excessive terrain closure, appropriate annunciations are displayed on the HUD. Additional warnings and annunciations that are required to be a part of these systems, and are normally required as part of the approved design to be in the pilot's primary field of view (i.e., the line of vision when looking forward along the flight path), must remain in the pilot's primary field of view when utilizing the HUD for flight information.

(4) Symbols must appear clean-shaped, clear, and explicit. Lines must be narrow, sharp-edged, and without halo or aliasing. Symbols must be stable with no discernible flicker or jitter.

(5) The optical qualities (accommodation, luminance, vergence) of the HUD shall be uniform across the entire field of view. When viewed by both eyes from any off-center position within the eyebox, non-uniformities shall not produce perceivable differences in binocular view.

(6) For all phases of flight, the HUD must update the positions and motions of primary control symbols with sufficient rates and latencies to support satisfactory manual control performance.

(7) The HUD display must present all information in a clear and unambiguous manner. Display clutter must be minimized. The HUD symbology must not interfere with the pilots' forward view, ability to visually maneuver the airplane, acquire opposing traffic, and see the runway environment. Critical and essential data elements of primary flight displays must not be removed by any declutter function. Changes in the display format and primary flight data arrangement should be minimized to prevent confusion and to enhance the pilots' ability to interpret vital data.

(8) The content, arrangement, and format of the information must be sufficiently compatible with the head down displays to preclude pilot confusion, misinterpretation, or excessive cognitive workload. Immediate transition between the two displays, whether required by navigation duties, failure conditions, unusual airplane attitudes, or other reasons, must not present difficulties in data interpretation or delays/interruptions in the crew's ability to manually control the airplane or to monitor the automatic flight control system.

(9) The HUD display must enable the flightcrew to immediately recognize and perform a safe recovery from unusual airplane attitudes. This capability must be shown in a simulator and on the airplane for all foreseeable modes of upset. However, "corner conditions" (i.e., test conditions where more than one attitude parameter is at its extreme value) may be demonstrated in the simulator. Foreseeable modes of upset include—

- (i) flightcrew mishandling;
 - (ii) autopilot failure (including "slowovers" which are slowly developing changes in attitude that do not create forces directly felt by the pilot, and are only detectable by pilot reference to the flight instruments or automatic alerts); and
 - (iii) turbulence/gust encounters.
- (b) *Installation Requirements.*
- (1) The arrangement of HUD display controls must be visible to and within

reach of the pilot from any normal seated position. The position and movement of the controls must not lead to inadvertent operation. The HUD controls must be illuminated to be visible for all normal cockpit lighting conditions, and must not create any objectionable reflections on the HUD or other flight instruments.

(2) The HUD combiner brightness must be controllable to ensure uninterrupted visibility of all displayed information in the presence of dynamically changing background (ambient) lighting conditions. If automatic control of HUD brightness is not provided, it must be shown that a single setting is satisfactory. When the HUD brightness level is changed, the relative luminance of each displayed symbol, character, or data shall vary smoothly. In no case shall any selectable brightness level allow any information to be invisible while other data remains discernible. There shall be no objectionable brightness transients when switching between manual and automatic control. The HUD data shall be visible in lighting conditions from 0 fL to 10,000 fL. If certain lighting conditions prevent the crew from seeing and interpreting HUD data (for example, flying directly toward the sun), accommodation must be provided to permit the crew to make a ready transition to the head down displays.

(3) To the greatest extent practicable, the HUD controls must be integrated with other controls, including the flight director, to minimize the crew workload associated with HUD operation and to ensure flightcrew awareness of engaged flight guidance modes.

(4) The visibility of the HUD and the primary flight information displayed is paramount to the HUD's ability to perform its intended function as a primary flight display. The fundamental requirements for instrument arrangement and visibility specified in §§ 25.1321, 25.773, and 25.777 apply to these devices.

The design eyebox should be laterally and vertically centered around the respective pilot's design eye position, and should be large enough that the minimum monocular field of view is visible at the following minimum displacements from the cockpit design eye position:

Lateral: 1.5 inches left and right
Vertical: 1.0 inches up and down
Longitudinal: 2.0 inches fore and aft

The HUD installation must accommodate pilots from 5'2" to 6'3" tall, seated with seat belts fastened and positioned at the design eye position (ref. § 25.777(c)). Larger eyebox

dimensions may be required for meeting operational requirements for use as a full time primary flight display. Operational suitability and compliance with the requirements of the above cited regulations must be demonstrated and evaluated by the FAA. The design eye position must comply with the above cited regulations.

(5) Notwithstanding compliance with the minimum eyebox dimensions given above, the HUD eyebox must be large enough to serve as a primary flight display without inducing adverse effects on pilot vision and fatigue. Use of the HUD system shall not place physiologically burdensome limitations on head position. There must be no adverse physiological effects of long term use of the HUD system, such as fatigue or eye strain, that force the pilot to revert to the HDD. Long term use is considered four hours of continuous use of the HUD, or multiple flights per day with eight or more hours of use.

(c) *System Requirements.*

(1) The HUD system must be shown to perform its intended function as a primary flight display during all phases of flight. The normal operation of the HUD system cannot adversely affect, or be adversely affected by, other airplane systems. Malfunctions of the HUD system that cause loss of all primary flight information, including that displayed on the HUD and head down instruments, shall be extremely improbable.

(2) The classification of the HUD system's failure to display flight information and navigation information, as applicable to the airplane type design, including the potential to display hazardously misleading information, must be assessed according to §§ 25.1309 and 25.1333. All alleviating flightcrew actions that are considered in the HUD safety analysis must be validated during testing for incorporation in the airplane flight manual procedures section or for inclusion in type-specific training. The failure cases discussed below, which consider the entire suite of cockpit displays of each flight parameter, hazardously misleading failures are, by definition, not associated with a suitable warning.

(i) *Attitude.* Display of attitude in the cockpit is a critical function. Loss of all attitude display, including standby attitude, is classified as a catastrophic failure and must be extremely improbable. Loss of primary attitude display for both pilots is classified as a major failure and must be improbable. Display of hazardously misleading roll or pitch attitude simultaneously on the primary attitude displays for both pilots

is classified as a catastrophic failure and must be extremely improbable. Display of hazardously misleading roll or pitch attitude on any single primary attitude display is classified as a major failure and must be improbable.

(ii) *Airspeed.* Display of airspeed in the cockpit is a critical function. Loss of all airspeed display, including standby, is classified as a catastrophic failure and must be extremely improbable. Loss of primary airspeed display for both pilots is classified as a major failure and must be improbable. Displaying hazardously misleading airspeed simultaneously on both pilots' displays, coupled with the loss of stall warning or overspeed warning functions, is classified as a catastrophic failure and must be extremely improbable.

(iii) *Barometric Altitude.* Display of altitude in the cockpit is a critical function. Loss of all altitude display, including standby, is classified as a catastrophic failure and must be extremely improbable. Loss of primary altitude display for both pilots is classified as a major failure and must be improbable. Displaying hazardously misleading altitude simultaneously on both pilots' displays is classified as a catastrophic failure and must be extremely improbable.

(iv) *Vertical Speed.* Display of vertical speed in the cockpit is an essential function. Loss of vertical speed display to both pilots is classified as a major failure and must be improbable.

(v) *Slip/Skid Indication.* The slip/skid or side slip indication is an essential function. Loss of this function to both pilots is classified as a major failure and must be improbable. Simultaneously misleading slip/skid or side slip information to both pilots is classified as a major failure and must be improbable.

(vi) *Heading.* Display of stabilized heading in the cockpit is an essential function. Displaying hazardously misleading heading information on both pilots' primary displays is classified as a major failure and must be improbable. Loss of stabilized heading in the cockpit is classified as a major failure and must be improbable. Loss of all heading information in the cockpit is classified as a catastrophic failure and must be extremely improbable.

(vii) *Navigation.* Display of navigation information (excluding heading, airspeed, and clock data) in the cockpit is an essential function. Loss of all navigation information is classified as a major failure and must be improbable. Displaying hazardously misleading navigational or positional information simultaneously on both pilots' displays is classified as a major failure and must

be improbable. However, the nonrestorable loss of the combination of all navigation and communication functions is classified as a catastrophic failure and must be extremely improbable.

(viii) *Crew Alerting Displays.* Loss of crew alerting for essential functions is classified as a major failure and must be improbable. Display of hazardously misleading crew alerting messages is classified as a major failure and must be improbable.

(3) The display of hazardously misleading information on more than one primary flight display is classified as a catastrophic failure and must be extremely improbable; therefore, the HUD system software which generates, displays, or affects the generation or display of primary flight information shall be developed to Level A requirements, as specified by RTCA Document DO-178B, "Software Considerations in Airborne Systems and Equipment Certification," or similar processes that provide equivalent product and compliance data. Monitoring software shown to have no ability to generate, display, or affect the generation or display of primary flight information, and which has the capability to command shutdown of the HUD system, shall be developed to no less rigor than that defined for Level C, or criticality as determined by a safety assessment of the HUD system.

(4) The HUD system must monitor the position of the combiner and provide a warning to the crew when the combiner position is such that conformal symbols will be hazardously misaligned.

(5) The HUD system must be shown to comply with the high intensity radiated fields certification requirements of Special Condition No. 3.

3. *Protection From Unwanted Effects of High Intensity Radiated Fields*

(a) Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to high-intensity radiated fields.

(b) For the purpose of this special condition, the following definition applies:

Critical Functions. Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Discussion: With the trend toward increased power levels from ground-

based transmitters, plus the advent of space and satellite communications, coupled with electronic command and control of the airplane, the immunity of critical digital avionics systems to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF.

Furthermore, coupling of electromagnetic energy to cockpit-installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown with either paragraph 1 or 2 below:

1. A minimum threat of 100 volts per meter peak electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the following field strengths for the frequency ranges indicated.

Frequency	Field strength (volts per meter)	
	Peak	Average
200 MHz–400 MHz ...	30	30
400 MHz–700 MHz ...	80	80
700 MHz–1 GHz	690	240
1 GHz–2 GHz	970	70
2 GHz–4 GHz	1570	350
4 GHz–6 GHz	7200	300
6 GHz–8 GHz	130	80
8 GHz–12 GHz	2100	80
12 GHz–18 GHz	500	330
18 GHz–40 GHz	780	20

4. Interaction of Systems and Structures

(a) *General.* Airplanes equipped with systems that affect structural performance, either directly or as a result of a failure or malfunction, must account for the influence of these systems and their failure conditions in showing compliance with the requirements of subparts C and D of part 25. The following criteria must be used to evaluate the structural performance of airplanes equipped with flight control systems, autopilots, stability augmentation systems, load alleviation systems, flutter control systems, and fuel management systems: If these criteria are used for other systems, it may be necessary to adapt the criteria to the specific system.

(b) *System fully operative.* With the system fully operative, the following apply:

(1) Limit loads must be derived in all normal operating configurations of the systems from all the limit conditions specified in subpart C, taking into account any special behavior of such systems or associated functions or any effect on the structural performance of the airplane that may occur up to the

limit loads. In particular, any significant nonlinearity (rate of displacement of control surface, thresholds, or any other system nonlinearities) must be accounted for in a realistic or conservative way when deriving limit loads from limit conditions.

(2) The airplane must meet the strength requirements of part 25 (static strength, residual strength), using the specified factors to derive ultimate loads from the limit loads defined in paragraph (b)(1) above. The effect of nonlinearities must be investigated beyond limit conditions to ensure the behavior of the systems presents no anomaly compared to the behavior below limit conditions. However, conditions beyond limit conditions need not be considered when it can be shown that the airplane has design features that make it impossible to exceed those limit conditions.

(3) The airplane must meet the aeroelastic stability requirements of § 25.629.

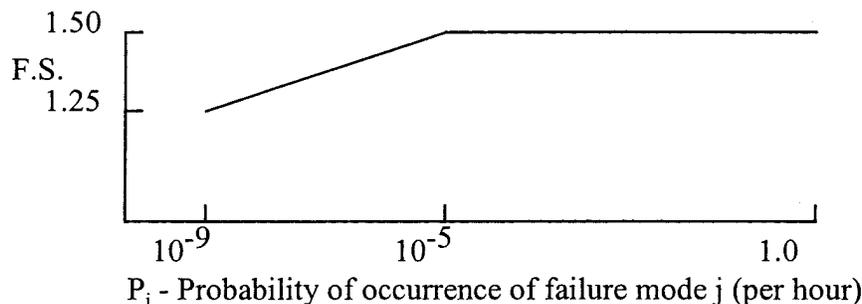
(c) *System in the Failure Condition.* For any system failure condition not shown to be extremely improbable, the following apply:

(1) *At the time of occurrence.* Starting from 1-g level flight conditions, a realistic scenario, including pilot corrective actions, must be established to determine the loads occurring at the time of failure and immediately after failure. The airplane must be able to withstand these loads, multiplied by an appropriate factor of safety that is related to the probability of occurrence of the failure. The factor of safety (F.S.) is defined in Figure 1.

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Frequency	Field strength (volts per meter)	
	Peak	Average
10 KHz–100 KHz	30	30
100 KHz–500 KHz	40	30
500 KHz–2 MHz	30	30
2 MHz–30 MHz	190	190
30 MHz–70 MHz	20	20
70 MHz–100 MHz	20	20
100 MHz–200 MHz ...	30	30

Figure 1
Factor of Safety at Time of Occurrence



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(i) These loads must also be used in the damage tolerance evaluation

required by § 25.571(b) if the failure condition is probable.

(ii) Freedom from aeroelastic instability must be shown up to the

speeds defined in § 25.629(b)(2). For failure conditions that result in speed increases beyond V_C/M_C , freedom from aeroelastic instability must be shown to the increased speeds, so that the margins intended by § 25.629(b)(2) are maintained.

(iii) Notwithstanding subparagraph (1) of this paragraph, failures of the system that result in forced structural vibrations (oscillatory failures) must not produce peak loads that could result in catastrophic fatigue failure or detrimental deformation of primary structure.

(2) *For the continuation of the flight.* For the airplane in the system failed

state, and considering any appropriate reconfiguration and flight limitations, the following apply:

(i) Static and residual strength must be determined for loads derived from the following conditions at speeds up to V_C , or the speed limitation prescribed for the remainder of the flight:

(A) The limit symmetrical maneuvering conditions specified in §§ 25.331 and 25.345.

(B) The limit gust conditions specified in § 25.341, but using the gust velocities for V_C , and in § 25.345.

(C) The limit rolling conditions specified § 25.349 and the limit

unsymmetrical conditions specified in §§ 25.367 and 25.427 (b) and (c).

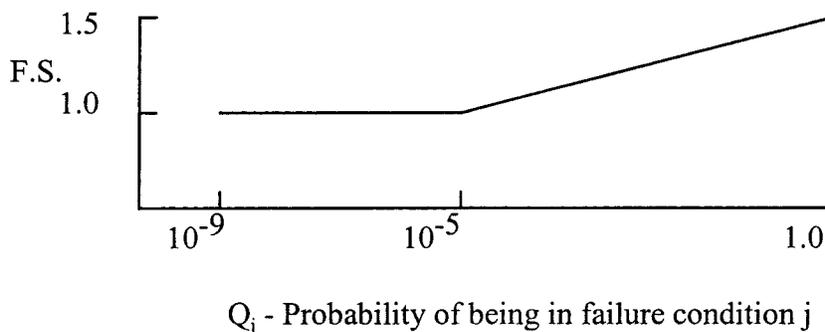
(D) The limit yaw maneuvering conditions specified in § 25.351.

(E) The limit ground loading conditions specified in §§ 25.473 and 25.491.

(ii) For static strength substantiation, each part of the structure must be able to withstand the loads specified in subparagraph (2)(i) of this paragraph, multiplied by a factor of safety depending on the probability of being in this failure state. The factor of safety is defined in Figure 2.

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Figure 2
Factor of Safety for Continuation of Flight



$Q_j = (T_j)(P_j)$ where:

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per hour)

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Note: If P_j is greater than 10^{-3} per flight hour, then a 1.5 factor of safety must be applied to all limit load conditions specified in subpart C.

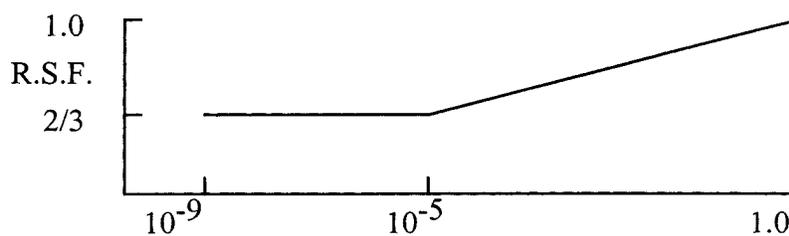
(iii) For residual strength substantiation as defined in § 25.571(b), structures affected by failure of the

system and with damage in combination with the system failure, a reduced factor may be applied to the loads of subparagraph (2)(i) of this paragraph. However, the residual strength level must not be less than the 1-g flight load, combined with the loads introduced by the failure condition, plus two-thirds of

the load increments of the conditions specified in subparagraph (2)(i) of this paragraph, applied in both positive and negative directions (if appropriate). The residual strength factor (R.S.F.) is defined in Figure 3.

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Figure 3
Residual Strength Factor



Q_j - Probability of being in failure condition j

$Q_j = (T_j)(P_j)$ where:

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per Hour)

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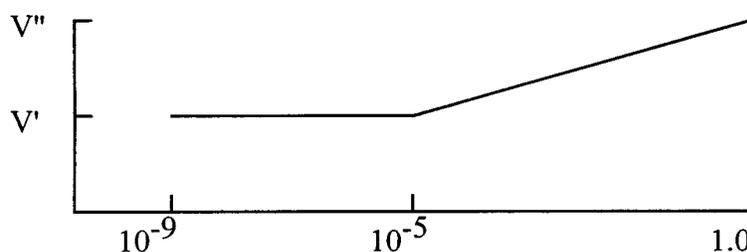
Note: If P_j is greater than 10^{-3} per flight hour, then a residual strength factor of 1.0 must be used.

(iv) If the loads induced by the failure condition have a significant effect on fatigue or damage tolerance, then their effects must be taken into account.

(v) Freedom from aeroelastic instability must be shown up to the speeds determined from Figure 4.

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Figure 4
Clearance Speed



Q_j - Probability of being in failure condition j

V' = Clearance speed as defined by § 25.629(b)(2).

V'' = Clearance speed as defined by § 25.629(b)(1).

$Q_j = (T_j)(P_j)$ where:

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per hour)

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Note: If P_j is greater than 10^{-3} per flight hour, then the flutter clearance speed must not be less than V'' .

(vi) Freedom from aeroelastic instability must also be shown up to V' in Figure 4 above, for any probable system failure condition combined with any damage considered in the evaluation required by § 25.571(b).

(vii) If the mission analysis method is used to account for continuous turbulence, all the systems failure conditions associated with their probability must be accounted for in a rational or conservative manner in order to ensure that the probability of exceeding the limit load is not higher than the value prescribed in appendix G to part 25.

(3) Consideration of certain failure conditions may be required by other sections of this part, regardless of calculated system reliability. Where analysis shows the probability of these failure conditions to be less than 10^{-9} , criteria other than those specified in this paragraph may be used for structural substantiation to show continued safe flight and landing.

(d) *Warning Considerations.* For system failure detection and warning, the following apply:

(1) The system must be checked for failure conditions, not shown to be extremely improbable, that degrade the structural capability of the airplane below the level required by part 25 or significantly reduce the reliability of the remaining system. The flightcrew must be made aware of these failures before flight. Certain elements of the control system, such as mechanical and hydraulic components, may use special periodic inspections, and electronic components may use daily checks, in lieu of warning systems, to ensure failure detection. These certification maintenance requirements must be limited to components that are not readily detectable by normal warning systems and where service history shows that inspections will provide an adequate level of safety.

(2) The existence of any failure condition, not shown to be extremely improbable, during flight that could significantly affect the structural capability of the airplane, and for which the associated reduction in airworthiness can be minimized by suitable flight limitations, must be signaled to the flightcrew. For example, failure conditions that result in a factor of safety below 1.25, as determined by paragraph (c) of this special condition, or flutter clearance speeds below V'' , as determined by paragraph (c) of this special condition, must be signaled to the flightcrew during flight.

(e) *Dispatch with Known Failure Conditions.* If the airplane is to be dispatched in a known system failure condition that affects structural performance, or affects the reliability of the remaining system to maintain structural performance, then the provisions of this special condition must be met for the dispatched condition and for subsequent failures. Operational and flight limitations may be taken into account.

(f) The following definitions are applicable to this special condition:

Structural performance: The capability of the airplane to meet the structural requirements of part 25.

Flight limitations: Limitations that can be applied to the airplane flight conditions following an in-flight occurrence and that are included in the flight manual (e.g., speed limitations, avoidance of severe weather conditions, etc.).

Operational limitations: Limitations, including flight limitations, that can be applied to the airplane operating conditions before dispatch (e.g., fuel and payload limitations).

Probabilistic terms: The probabilistic terms (probable, improbable, extremely improbable) used in this special condition are the same as those used in Advisory Circular (AC) 25.1309-1A.

Failure condition: The term failure condition is the same as that used in AC 25.1309-1A; however, this special condition applies only to system failure conditions that affect the structural performance of the airplane (e.g., failure conditions that induce loads, change the response of the airplane to inputs such as gusts or pilot actions, or lower flutter margins).

5. Design Maneuvering Requirements for Fly-by-Wire

(a) *Maximum elevator displacement at V_A .* In lieu of compliance with § 25.331(c)(1) of the FAR; the airplane is assumed to be flying in steady level flight (point A_1 , § 25.333(b)) and, except as limited by pilot effort in accordance with § 25.397, the cockpit pitching control device is suddenly moved to obtain extreme positive pitching acceleration (nose up). In defining the tail load condition, the response of the airplane must be taken into account. Airplane loads that occur subsequent to the normal acceleration at the center of gravity exceeding the maximum positive limit maneuvering factor, n , need not be considered.

(b) *Pitch maneuver loads.* In addition to the requirements of § 25.331; it must be established that pitch maneuver loads induced by the system itself (e.g., abrupt changes in orders made possible by electrical rather than mechanical combination of different inputs) are accounted for.

(c) *Roll maneuver loads.* In lieu of compliance with § 25.349(a), the following conditions, speeds, and spoiler and aileron deflections (except as the deflections may be limited by pilot effort) must be considered in combination with an airplane load factor of zero and of two-thirds of the positive maneuvering factor used in design. In determining the required aileron and spoiler deflections, the torsional flexibility of the wing must be considered in accordance with § 25.301(b).

(1) Conditions corresponding to steady rolling velocities must be investigated. In addition, conditions corresponding to maximum angular acceleration must be investigated. For the angular acceleration conditions, zero rolling velocity may be assumed in the absence of a rational time history investigation of the maneuver.

(2) At V_A , sudden deflection of the cockpit roll control up to the limit is assumed.

(3) At V_C , the cockpit roll control must be moved suddenly and maintained so as to achieve a rate of roll not less than that obtained in paragraph (2).

(4) At V_D , the cockpit roll control must be moved suddenly and maintained so as to achieve a rate of roll not less than one third of that obtained in paragraph (2).

(5) It must also be established that roll maneuver loads induced by the system itself (i.e., abrupt changes in orders made possible by electrical rather than mechanical combination of different inputs) are acceptably accounted for.

(d) *Yaw maneuver loads.* In lieu of compliance with § 25.351, the airplane must be designed for loads resulting from the conditions specified in paragraph (e) below. Unbalanced aerodynamic moments about the center of gravity must be reacted in a rational or conservative manner considering the principal masses furnishing the reacting inertia forces. Physical limitations of the airplane from the cockpit yaw control device to the control surface deflection, such as control stop position, maximum power and displacement rate of the servo controls, or control law limiters, may be taken into account.

(e) *Maneuvering.* At speeds from V_{MC} to V_D , the following maneuvers must be considered. In computing the tail loads, the yawing velocity may be assumed to be zero.

(1) With the airplane in unaccelerated flight at zero yaw, it is assumed that the cockpit yaw control device (pedal) is suddenly displaced (with critical rate) to the maximum deflection, as limited by the stops.

(2) With the cockpit yaw control device (pedal) deflected as specified in paragraph (1) above, it is assumed that the airplane yaws to the resulting side slip angle (beyond the static side slip angle).

(3) With the airplane yawed to the static sideslip angle with the cockpit yaw control device deflected as specified in paragraph (1) above, it is assumed that the cockpit yaw control device is returned to neutral.

6. Limit Engine Torque Loads for Sudden Engine Stoppage

In lieu of showing compliance with § 25.361(b), the following apply:

(a) For turbine engine and auxiliary power unit installations, the mounts and local supporting structure must be designed to withstand each of the following:

(1) The maximum limit torque load imposed by—

(i) A sudden deceleration due to a malfunction that could result in a

temporary loss of power or thrust capability, and could cause a shutdown due to vibrations; and

(ii) The maximum acceleration of the engine and auxiliary power unit.

(2) The maximum torque load, considered as ultimate, imposed by sudden engine or auxiliary power unit stoppage due to a structural failure, including fan blade failure.

(3) The load condition defined in paragraph (a)(2) of this section is also assumed to act on adjacent airframe structure, such as the wing and fuselage. This load condition is multiplied by a factor of 1.25 to obtain ultimate loads when the load is applied to the wing and fuselage structure.

7. Flight Characteristic Compliance Determination by use of the Handling Qualities Rating System for EFCS Failure Cases

(a) In lieu of showing compliance with § 25.672(c), a handling qualities rating system will be used for evaluation of EFCS configurations resulting from single and multiple failures not shown to be extremely improbable. The handling qualities ratings are:

(1) Satisfactory: Full performance criteria can be met with routine pilot effort and attention.

(2) Adequate: Adequate for continued safe flight and landing; full or specified reduced performance can be met, but with heightened pilot effort and attention.

(3) Controllable: Inadequate for continued safe flight and landing, but controllable for return to a safe flight condition, safe flight envelope, and/or reconfiguration so that the handling qualities are at least adequate.

(b) Handling qualities will be allowed to progressively degrade with failure state, atmospheric disturbance level, and flight envelope. Specifically, within the normal flight envelope, the pilot-rated handling qualities must be satisfactory/adequate in moderate atmospheric disturbance for probable failures, and must not be less than adequate in light atmospheric disturbance for improbable failures.

8. Static Longitudinal Stability

In lieu of compliance with § 25.173, the airplane must be shown to have suitable static longitudinal stability in any condition normally encountered in service, including the effects of atmospheric disturbance. The HQRS may be used to make this assessment.

9. Static Lateral-Directional Stability

In lieu of compliance with § 25.177, the following applies:

(a) The airplane must be shown to have suitable static lateral directional stability in any condition normally encountered in service, including the effects of atmospheric disturbance. The HQRS may be used to make this assessment.

(b) In straight, steady sideslips, the rudder control movements and forces must be substantially proportional to the angle of sideslip in a stable sense; and the factor of proportionality must lie between limits found necessary for safe operation throughout the range of sideslip angles appropriate to the operation of the airplane. At greater angles, up to the angle at which full rudder is used or a rudder force of 180 pounds is obtained, the rudder pedal forces may not reverse; and increased rudder deflection must be needed for increased angles of sideslip. Compliance with this paragraph must be demonstrated for all landing gear and flap positions and symmetrical power conditions at speeds from $1.13 V_{SR1}$, or $1.18 V_{SR1PWR}$ for flaps extended configurations, to V_{FE} , V_{LE} , or V_{FC}/M_{FC} , as appropriate.

10. Control Surface Awareness

In addition to compliance with §§ 25.143, 25.671, and 25.672, when a flight condition exists where, without being commanded by the crew, control surfaces are coming so close to their limits that return to the normal flight envelope and (or) continuation of safe flight requires a specific crew action, a suitable flight control position annunciation shall be provided to the crew, unless other existing indications are found adequate or sufficient to prompt that action.

Note: The term suitable also indicates an appropriate balance between nuisance and necessary operation.

11. Steep Approach Air Distance

In lieu of compliance with § 25.125(a) for steep approach landing distances, the following applies:

(a) The horizontal distance necessary to land and to come to a complete stop, including an airborne distance of no less than the greater of either 500 feet or the distance resulting from the combination of the distance between the runway threshold and the touchdown aim point to be used in operations plus the demonstrated 3σ dispersion distance from the touchdown aim point, must be determined (at each weight for temperature, altitude, and wind within the operational limits established by the applicant for the airplane) as follows:

(1) The airplane must be in the landing configuration.

(2) A stabilized approach, with a calibrated airspeed of not less than V_{REF} or V_{MCL} , whichever is greater, must be maintained down to the 50 foot height. V_{REF} may not be less than—

(i) $1.03 V_{SR0}$;

(ii) $1.20 V_{SR0PWR}$ with the operative engines at the power or thrust setting for approach at the reference flight path angle;

(iii) The airspeed that provides an angle-of-attack margin to stall for not less than a 20 knot equivalent airspeed vertical gust with all engines operating at the power or thrust setting for approach at the reference flight path angle;

(iv) The airspeed that provides an angle-of-attack margin to stall for not less than a 15 knot equivalent airspeed vertical gust with the critical engine inoperative at the power or thrust setting for approach at the reference flight path angle; and

(v) A speed that provides the maneuvering capability specified in paragraph (k) of Special Condition No.

1.

(3) Changes in configuration, power or thrust, and speed, must be made in accordance with the established procedures for service operation.

(4) The landing must be made without excessive vertical acceleration, tendency to bounce, nose over, ground loop, porpoise, or water loop.

(5) The landings may not require exceptional piloting skill or alertness.

12. Landing Distances for Special Approaches to Short Field Landings

(a) In lieu of compliance with § 25.125(a), the following applies: The horizontal distance necessary to land and come to a complete stop from a point 50 feet above the landing surface must be determined (for each weight, altitude, wind, temperature, and runway slope within the operational limits established for the airplane) as follows:

(1) The airplane must be in the landing configuration.

(2) A stabilized approach, with a calibrated airspeed of not less than V_{REF} or V_{MCL} , whichever is greater, must be maintained down to the 50 foot height. V_{REF} may not be less than—

(i) $1.03 V_{SR0}$;

(ii) $1.20 V_{SR0PWR}$ with the operative engines at the power or thrust setting for approach at the reference flight path angle;

(iii) The airspeed that provides an angle-of-attack margin to stall for not less than a 20 knot equivalent airspeed vertical gust with all engines operating at the power or thrust setting for approach at the reference flight path angle;

(iv) The airspeed that provides an angle-of-attack margin to stall for not less than a 15 knot equivalent airspeed vertical gust with the critical engine inoperative at the power or thrust setting for approach at the reference flight path angle; and

(v) A speed that provides the maneuvering capability specified in paragraph (k) of Special Condition No. 1.

(3) Changes in configuration, power or thrust, and speed, must be made in accordance with the established procedures for service operation.

(4) The landing must be made without excessive vertical acceleration, tendency to bounce, nose over, ground loop, porpoise, or water loop.

(5) The landings may not require exceptional piloting skill or alertness.

(b) In lieu of compliance with § 25.125(b), the following applies: For land planes, the landing distance on land must be determined on level, smooth, dry and wet, hard-surfaced runways. In addition—

(1) The pressures on the wheel braking systems may not exceed those specified by the brake manufacturer;

(2) The brakes may not be used so as to cause excessive wear of brakes or tires; and

(3) Means other than wheel brakes may be used if that means—

(i) Is safe and reliable;

(ii) Is used so that consistent results can be expected in service; and

(iii) Is such that exceptional skill is not required to control the airplane.

(4) The average touchdown rate of descent must not exceed 4 feet per second and the approach flight path angle must be no greater than -3 degrees for a normal approach.

(c) Procedures must be established by the applicant for use in service that are consistent with those used to establish the performance data under this special condition. These procedures must be able to be consistently executed in service by crews of average skill, and must include, as applicable, speed additives for turbulence and gusts for approaches with all engines operating and with an engine failure on final approach, and the use of thrust reversers on all operative engines during the landing rollout.

(d) The procedures and performance data established under this special condition must be furnished in the Airplane Flight Manual.

13. Thrust for Landing Climb

In lieu of compliance with § 25.119(a), the following applies: The engines at the power or thrust that is available eight seconds after initiation of movement of

the power or thrust controls to the go-around power or thrust setting from the thrust level necessary to maintain a stabilized approach at a flight path angle two degrees steeper than the desired flight path angle.

Issued in Renton, WA on May 7, 1999.

John J. Hickey,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99-12361 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 97-AWP-16]

Proposed Establishment of Class E Airspace; Minden, NV

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish a Class E airspace area at Minden, NV. The establishment of a Global Positioning System (GPS) GPS-A and GPS-B Standard Instrument Approach Procedure (SIAP) at Minden-Tahoe Airport has made this proposal necessary. Additional controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing the GPS-A and GPS-B SIAP to Minden-Tahoe Airport. The intended effect of this proposal is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at Minden-Tahoe Airport, Minden, NV.

DATES: Comments must be received on or before June 28, 1999.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Attn: Manager, Airspace Branch, AWP-520, Docket No. 97-AWP-16, Air Traffic Division, 15000 Aviation Boulevard, Lawndale, California, 90261.

The official docket may be examined in the Office of the Regional Counsel, Western-Pacific Region, Federal Aviation Administration, Room 6007, 15000 Aviation Boulevard, Lawndale, California 90261.

An informal docket may also be examined during normal business hours at the Office of the Manager, Airspace Branch, Air Traffic Division at the above address.

FOR FURTHER INFORMATION CONTACT:

Larry Tonish, Air Traffic Airspace Specialist, Airspace Branch, AWP-520,

Air Traffic Division, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California, 90261, telephone (310) 725-6539.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with the comments a self-addressed, stamped postcard on which the following statement is made:

“Comments to Airspace Docket No. 97-AWP-16.” The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of comments received. All comments submitted will be available for examination in the Airspace Branch, Air Traffic Division, 15000 Aviation Boulevard, Lawndale, California 90261, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Airspace Branch, 15000 Aviation Boulevard, Lawndale, California 90261. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2A, which describes the application procedures.

The Proposal

The FAA is considering an amendment to 14 CFR part 71 by establishing a Class E airspace area at

Minden, NV. The establishment of GPS-A and GPS-B SIAP at Minden-Tahoe Airport has made this proposal necessary. Additional controlled airspace extending upward from 700 feet above the surface is needed to contain aircraft executing the GPS approach procedures at Minden-Tahoe Airport. The intended effect of this proposal is to provide adequate controlled airspace for aircraft executing the GPS-A and GPS-B SIAP at Minden-Tahoe Airport, Minden-Tahoe, NV. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9F dated September 10, 1998, and effective September 16, 1998, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in this Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation—(1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9F, Airspace

Designations and Reporting Points, dated September 10, 1998, and effective September 16, 1998, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AWP NV E5 Minden, NV [New]

Minden-Tahoe Airport, NV
(Lat 39°00'02" long. 119°45'11"W)

That airspace extending upward from 700 feet above the surface and within a 6.5-mile radius of the Minden-Tahoe Airport.

* * * * *

Issued in Los Angeles, California, on May 6, 1999.

John Clancy,

Manager, Air Traffic Division, Western-Pacific Region.

[FR Doc. 99–12511 Filed 5–17–99; 8:45 am]

BILLING CODE 4910–13–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1260

Withdrawal of Proposed Rule on Miscellaneous Revisions to the NASA Grant and Cooperative Agreement Handbook, Section A, Management Fee

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Withdrawal of proposed rule.

SUMMARY: NASA published a proposed rule on December 29, 1998 (63 FR 71609), to revise the NASA Grant and Cooperative Agreement handbook (14 CFR part 1260) to specify that for all awards of new grants and cooperative agreements, and modifications of existing grants and cooperative agreements, management fee shall not be permitted. The rationale for the proposed rule was that management fee had been provided on less than 1 percent of NASA grants and cooperative agreements and that fee was generally not consistent with the purpose of financial assistance instruments. However, based on public comments, NASA has decided to withdraw the proposed rule because, in limited situations, a nominal fee may be warranted and necessary for the recipient to perform NASA research.

DATES: The proposed rule published at 63 FR 71609 is withdrawn May 18, 1999.

FOR FURTHER INFORMATION CONTACT: Reginald Walker, (202) 358–0443, Code

HC, Washington, DC 20546, e-mail: Reginald.Walker@hq.nasa.gov.

Tom Luedtke,

Acting Associate Administrator for Procurement.

[FR Doc. 99–12373 Filed 5–17–99; 8:45 am]

BILLING CODE 7510–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Chapter IX

[Docket No. FR–4459–N–04]

Negotiated Rulemaking Committee on Section 8 Housing Certificate Fund Rule; Meetings

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Negotiated Rulemaking Committee meetings.

SUMMARY: This document announces the second, third, fourth, and fifth meetings of the Negotiated Rulemaking Committee on Section 8 Tenant-based Contract Renewal Allocation. These meetings are sponsored by HUD for the purpose of discussing and negotiating a proposed rule that would change the current method of distributing funds to public housing agencies (PHAs) for purposes of renewing assistance contracts in the tenant-based Section 8 program.

DATES: The second committee meeting will be held on June 2 and June 3, 1999. The third committee meeting will be held on June 21 and June 22, 1999. The fourth committee meeting will be held on July 19 and July 20, 1999. The fifth committee meeting will be held on August 19 and 20, 1999. All meetings will begin at approximately 9:00 am and conclude at approximately 5:00 pm.

ADDRESSES: The second committee meeting will take place at Hyatt Dulles Hotel (Concorde Ballroom), 2300 Dulles Corner Boulevard, Herndon, VA 22701. The locations of the third, fourth and fifth committee meetings will be announced through separate **Federal Register** document.

FOR FURTHER INFORMATION CONTACT: Robert Dalzell, Senior Program Advisor, Office of Public and Assisted Housing Delivery, Office of Public and Indian Housing, Room 4204, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500; telephone (202) 708–1380 (this telephone number is not toll-free). Hearing or speech-impaired individuals may access this number via TTY by

calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: On April 26, 1999 (64 FR 20232), HUD published a **Federal Register** document announcing the establishment of the Negotiated Rulemaking Advisory Committee on Section 8 Tenant-Based Contract Renewal. The April 26, 1999 notice also announced the committee members, and the dates, location, and agenda for the first committee meeting. The purpose of the committee is to discuss and negotiate a rule that would change the current method of distributing funds to public housing agencies (PHAs) for purposes of renewing assistance contracts in the tenant-based Section 8 program.

The second, third, fourth, and fifth meetings of the negotiated rulemaking committee will take place as described in the **DATES** and **ADDRESSES** section of this document.

The agenda planned for the meetings includes: (1) review and approval of the minutes for the first committee meeting; (2) discussion of the issues relating to the development of regulations implementing new section 8(dd); (3) development of draft regulatory language; and (4) the scheduling of future meetings.

The meeting will be open to the public without advance registration. Public attendance may be limited to the space available. Members of the public may make statements during the meeting, to the extent time permits, and file written statements with the committee for its consideration. Written statements should be submitted to the address listed in the **FOR FURTHER INFORMATION** section of this document. Summaries of committee meetings will be available for public inspection and copying at the address in the same section.

Dated: May 12, 1999.

Deborah Vincent,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 99-12434 Filed 5-17-99; 8:45 am]

BILLING CODE 4210-33-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-103694-99]

RIN 1545-AW75

Section 467 Rental Agreements Involving Payments of \$2,000,000 or Less

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations concerning section 467 rental agreements. The regulations remove the constant rental accrual exception for rental agreements involving payments of \$2,000,000 or less. The regulations affect taxpayers that are parties to a section 467 rental agreement entered into on or after July 19, 1999.

DATES: Written or electronically generated comments and requests for a public hearing must be received by August 16, 1999.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG-103694-99), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG-103694-99), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to http://www.irs.ustreas.gov/tax_regs/regslst.html (the IRS Internet address).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Forest Boone, (202) 622-4960; concerning submissions of comments, Michael L. Slaughter, (202) 622-7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to section 467 of the Income Tax Regulations (26 CFR Part 1). Section 467 was added to the Internal Revenue Code by section 92(a) of the Tax Reform Act of 1984 (Pub. L. 98-369 (98 Stat. 609)). On June 3, 1996, the IRS and Treasury Department issued a notice of proposed rulemaking (61 FR 27834 [IA-292-84, 1996-2 C.B. 462]) relating to section 467. Comments

responding to the notice were received, and a public hearing was held on September 25, 1996. After considering the comments received and the statements made at the public hearing, final regulations under section 467 have been completed and also appear elsewhere in this issue of the **Federal Register**. This regulation proposes to amend the section 467 regulations and, for purposes of the application of constant rental accrual, treat rental agreements involving payments of \$2,000,000 or less in the same manner as those agreements involving payments of more than \$2,000,000.

Explanation of Provisions

Under the section 467 final regulations, section 467 applies only in the case of rental agreements with increasing or decreasing rent or deferred or prepaid rent. However, section 467 is not applicable in the case of rental agreements involving payments and other consideration of \$250,000 or less. See section 467(d)(2).

The section 467 final regulations provide that if section 467 is applicable, the amount of fixed rent that must be taken into account by a lessor and lessee for a rental period is either the amount of fixed rent allocated to the period under the agreement, the proportional rental amount, or the constant rental amount (constant rental accrual). Constant rental accrual is to be used only where the section 467 rental agreement is a disqualified leaseback or long-term agreement. Under the section 467 final regulations, a rental agreement will not be a disqualified leaseback or long-term agreement, and, consequently, will not be subject to constant rental accrual, if it requires \$2,000,000 or less in rental payments and other consideration.

The IRS and Treasury Department have reconsidered the \$2,000,000 constant rental accrual exception and have determined that it should be eliminated from the section 467 final regulations. The original purpose of the \$2,000,000 exception was to simplify the section 467 rules for small businesses. Upon further reflection, however, the IRS and Treasury Department believe that the \$2,000,000 exception inappropriately permits certain rental agreements to avoid the application of constant rental accrual, and that the inappropriate avoidance of constant rental accrual outweighs the need for simplification. Further, section 467(d)(2) provides an exception from section 467 for rental agreements with payments and other consideration of \$250,000 or less. However, because the \$2,000,000 constant rental accrual

exception was included in the proposed regulations, the \$2,000,000 exception will continue to apply to agreements entered into on or before July 19, 1999.

Special Analyses

It has been determined that these proposed regulations are not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and 8 copies) and electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information: The principal author of the regulations is Forest Boone, Office of Assistant Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Treasury Department participated in the development of the regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par 2. In § 1.467-3, paragraph (b)(1) is revised to read as follows:

§ 1.467-3 Disqualified leasebacks and long-term agreements.

* * * * *

(b) *Disqualified leaseback or long-term agreement*—(1) *In general.* A leaseback (as defined in paragraph (b)(2) of this section) or a long-term agreement (as defined in paragraph (b)(3) of this section) is disqualified only if—

(i) A principal purpose for providing increasing or decreasing rent is the avoidance of Federal income tax (as described in paragraph (c) of this section); and

(ii) The Commissioner determines that, because of the tax avoidance purpose, the section 467 rental agreement should be treated as a disqualified leaseback or long-term agreement.

* * * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 99-11892 Filed 5-17-99; 8:45 am]

BILLING CODE 4830-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 009-0137b; FRL-6337-9]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, Six California County Air Pollution Control Districts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is approving revisions to the California State Implementation Plan. The revisions concern rules from the following: Kern County Air Pollution Control District (KCAPCD); Lake County Air Quality Management District (LCAQMD); Modoc County Air Pollution Control District (MCAPCD); Northern Sierra Air Quality Management District (NSAQMD); San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD); and Ventura County Air Pollution Control District (VCAPCD). The rules control particulate matter (PM) emissions from open burning, orchard heaters, or processes identified by a weight rate throughput.

The intended effect of this action is to regulate emissions of PM in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). In the Final Rules Section of this **Federal Register**, the EPA is approving the state's SIP revision as a direct final

rule without prior proposal because the Agency views this as a noncontroversial revision and anticipates no adverse comments. A detailed rationale for this approval is set forth in the direct final rule. If no relevant adverse comments are received, no further activity is contemplated in relation to this rule. If EPA receives relevant adverse comments, the direct final rule will not take effect and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this rule. Any parties interested in commenting on this rule should do so at this time.

DATES: Comments must be received in writing by June 17, 1999.

ADDRESSES: Comments should be addressed to: Andrew Steckel, Rulemaking Office (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Copies of the rule revisions and EPA's evaluation report of each rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rule revisions are also available for inspection at the following locations:

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 95812.

Kern County Air Pollution Control District, 2700 "M" Street, Suite 290, Bakersfield, CA 93301.

Lake County Air Quality Management District, 883 Lakeport Boulevard, Lakeport, CA 95453.

Modoc County Air Pollution Control District, 202 West 4th Street, Alturas, CA 96101.

Northern Sierra Air Quality Management District, 540 Searls Avenue, Nevada City, CA 95959.

San Joaquin Valley Unified Air Pollution Control District, 1990 East Gettysburg Street, Fresno, CA 93726.

Ventura County Air Pollution Control District, 702 County Square Drive, Ventura, CA 93003.

FOR FURTHER INFORMATION CONTACT: Al Petersen, Rulemaking Office, (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744-1135.

SUPPLEMENTARY INFORMATION:

This document concerns the rules listed below with the date they were adopted or amended by the Districts and the date they were submitted to EPA by the California Air Resources Board: KCAPCD Rule 409, Fuel Burning Equipment (as amended on May 7, 1998, submitted June 23, 1998); LCAQMD Section (Rule) 248.5,

Prescribed Burning (Definition) (as adopted on December 6, 1988, submitted February 7, 1989); LCAQMD Section (Rule) 270, Wildland Vegetation Management Burning (Definition) (as adopted on December 6, 1988, submitted February 7, 1989); LCAQMD Section (Rule) 640, (Permit Exemptions) (as amended on July 15, 1997, submitted March 10, 1998); LCAQMD Section (Rule) 1002, (Agencies Authorized to Issue Burn Permits) (as amended on March 19, 1996, submitted May 18, 1998); Lake County Section (Rule) 1010, (No-Burn Day) (as adopted on June 13, 1989, submitted March 26, 1990); LCAQMD Section (Rule) 1350, Burning of Standing Tule (as adopted on October 15, 1996, submitted March 10, 1998); MCAPCD Rule 4.11, Orchard Heaters (as adopted on January 3, 1989, submitted December 31, 1990); NSAQMD Rule 211, Process Weight per Hour (as adopted on September 11, 1991, submitted October 28, 1996); SJVUAPCD Rule 4301, Fuel Burning Equipment (as amended on December 17, 1992, submitted September 28, 1994); and VCAPCD Rule 56, Open Fires (as amended on March 29, 1994, submitted May 24, 1994). For further information, please see the information provided in the Direct Final action that is located in the Rules section of this **Federal Register**.

Dated: April 9, 1999.

David P. Howekamp,

Acting Regional Administrator, Region IX.

[FR Doc. 99-12158 Filed 5-17-99; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MN38-011-6971b; FRL-6339-6]

Approval and Promulgation of State Implementation Plans; Minnesota

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document the Environmental Protection Agency (EPA) is proposing to approve revisions to the Minnesota's State Implementation Plan (SIP) permitting program by addressing portions of Minnesota's Rules Parts 7007 and 7011. Under the current federally mandated permitting programs, applicability is based on a sources potential to emit, and sources with the potential to emit in major amounts are subject to these programs. In the final rules section of this **Federal**

Register, EPA is approving the State's request as a direct final rule without prior proposal because EPA views this action as noncontroversial and anticipates no adverse comments. A detailed rationale for approving and disapproving portions of the State's request is set forth in the direct final rule. The direct final rule will become effective without further notice unless the Agency receives relevant adverse written comment. Should the Agency receive such comment, it will publish a document informing the public that the direct final rule will not take effect and such public comment received will be addressed in a subsequent final rule based on this proposed rule. If no adverse comments are received, the direct final rule will take effect on the date stated in that document and no further activity will be taken on this proposed rule. EPA does not plan to institute a second comment period on this action. Any parties interested in commenting on this document should do so at this time.

DATES: Written comments must be received on or before June 17, 1999.

ADDRESSES: Written comments should be sent to: Robert Miller, Chief, Permits and Grants Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Rachel Rineheart at (312) 886-7017.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule published in the rules section of this **Federal Register**. Copies of the documents relevant to this action are available for public inspection during normal business hours at the above address. (Please telephone Rachel Rineheart at (312) 886-7017 before visiting the Region 5 Office.)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Particulate matter, Volatile organic compound.

Authority: 42 U.S.C. 7401-7671q.

Dated: April 23, 1999.

David A. Ullrich,

Acting Regional Administrator, Region 5.

[FR Doc. 99-12367 Filed 5-17-99; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 112

[FRL-6343-9]

Oil Pollution Prevention and Response; Non-Transportation-Related Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of extension of comment period for proposed rule and advance notice of proposed rulemaking.

SUMMARY: The U.S. Environmental Protection Agency (EPA or we) published a proposed rule to amend the Facility Response Plan requirements in the Oil Pollution Prevention and Response regulation found at 40 CFR part 112. We also published an advance notice of proposed rulemaking seeking comments on how we might differentiate among the various classes of oil for purposes of the Spill Prevention, Control, and Countermeasures Plan requirements. Both the proposed rule and advance notice of proposed rulemaking were published on April 8, 1999 (64 FR 17227). The comment period for both ended on May 10, 1999. In response to requests from commenters, we are extending the comment periods for the proposed and for the advance notice of proposed rulemaking.

DATES: The comment period for the proposed rule is extended through June 9, 1999. The comment period for the advance notice of proposed rulemaking is extended through July 7, 1999.

ADDRESSES: The official record for this rulemaking is located in the Superfund Docket at 1235 Jefferson Davis Highway, Crystal Gateway 1, Arlington, Virginia 22202, Suite 105. The docket numbers for the proposed rule and advance notice of proposed rulemaking are SPCC-9P, and SPCC-10P, respectively. The record supporting this rulemaking is contained in the Superfund Docket and is available for inspection by appointment only, between the hours of 9 a.m. and 4 p.m., Monday through Friday, excluding legal holidays. You may make an appointment to review the docket by calling 703-603-9232. The mailing address for the dockets is Superfund Docket, Docket Numbers SPCC-9P and SPPC-10P, mail code 5203G, U.S. Environmental Protection Agency, 401 M St., S.W., Washington, DC 20460. The electronic address of the dockets is superfund.docket@epamail.epa.gov. The

docket will mail copies of materials to you if you are outside of the Washington, DC metropolitan area.

FOR FURTHER INFORMATION CONTACT: Barbara Davis, Oil Program Center, U.S. Environmental Protection Agency, at 703-603-8823, concerning the proposed rule; or, Hugo Paul Fleischman, Oil Program Center, U.S. Environmental Protection Agency, at 703-603-8769, concerning the advance notice of proposed rulemaking. Alternatively you may call the RCRA/Superfund Hotline at 800-424-9436 (in the Washington, DC metropolitan area, 703-412-9810). The Telecommunications Device for the Deaf (TDD) Hotline number is 800-553-7672 (in the Washington, DC metropolitan area, 703-412-3323). You may wish to visit the Oil Program's Internet site at www.epa.gov/oilspill.

Dated: May 10, 1999.

Stephen D. Luftig,

Director, Office of Emergency and Remedial Response.

[FR Doc. 99-12490 Filed 5-17-99; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CC Docket No. 96-61; FCC 99-43]

Implementation of the Rate Integration Requirement of the Communications Act

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking

SUMMARY: By this *Notice of Proposed Rulemaking (Notice)*, the Commission seeks further comment on the application of rate integration to interstate, interexchange services offered by commercial mobile radio service (CMRS) providers. Specifically, the Commission invites interested parties to comment on how rate integration should be applied to wide-area calling plans, services offered by affiliates, plans that assess local airtime or roaming charges in addition to separate long-distance charges for interstate, interexchange services, and whether cellular and PCS service rates should be integrated.

DATES: Comments are due on, or before, May 27, 1999. Reply comments are due on, or before, June 28, 1999.

ADDRESSES: Federal Communications Commission, Secretary, 445 12th Street S.W., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Peter Wolfe, Wireless

Telecommunications Bureau, at (202) 418-2191.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Further Notice of Proposed Rulemaking* in the matter of *Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, CC Docket No.96-61, adopted March 8, 1999, and released April 21, 1999. The complete text of this *Notice* is available for inspection and copying during normal business hours in the Commission's Reference Center, room CY-A257, 445 12th Street S.W., Washington, DC. The *Notice* is available through the Internet at http://www.fcc.gov/Bureaus/Common_Carrier/notices/1999/fcc99043.wp. The complete text may be purchased from the Commission's duplicating contractor, International Transcription Service, Inc. (ITS, Inc.), at 1231 20th Street N.W., Washington, DC 20036, (202) 857-3800.

Synopsis of Further Notice of Proposed Rulemaking:

I. Introduction

1. In this *Notice*, we seek further comment on several issues regarding the application of rate integration under section 254(g) of the Communications Act to the interstate, interexchange services offered by commercial mobile radio service (CMRS) providers.

II. Applicability of Rate Integration to CMRS Services

A. Wide-Area Calling Plans

2. Many CMRS providers have created calling plans that allow customers to extend the size of the calling area in which they do not incur roaming or separate long-distance charges, generically referred to as wide-area calling plans. Under these types of plans, the customer generally is assessed a monthly fee and obtains a specified number of airtime minutes as part of the monthly charge. In this section, we seek comment on: (1) whether there are wide-area calling plans or other types of plans that should not be subject to rate integration; (2) what limitations would rate integration requirements place on CMRS providers' plans; and, (3) whether we should forbear from rate integration requirements for some, or all, wide-area plans.

3. Wide-area calling plans appear to offer customers significant benefits in the form of a simplified rate structure and additional choice. We believe that the analysis of wide-area calling plans begins with an examination of what constitutes an interexchange service, which is not defined in the Act. Some

parties argue that the meaning of interexchange service should be derived from the definition of "telephone toll service." Telephone toll service is defined as "telephone service between stations in different exchange areas for which a charge is not included in contracts with subscribers for exchange service." 47 U.S.C. 153(48). Some CMRS providers assert that because CMRS providers are not rate regulated, CMRS providers can establish any area they choose as the "exchange" area. Under this approach, an interexchange call exists only if a separate charge is assessed for the interexchange call. The definition of "telephone toll service" depends, in part, on the definition of "exchange services." "Telephone exchange service" is defined as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area * * * and which is covered by the exchange service charge, or * * * comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. 153(47). Cellular, broadband PCS, and covered SMR providers have been found to provide "comparable service" to telephone exchange service because, as a general matter, local, two-way switched voice service is a principal part of the service.

4. We invite parties to comment on how the definitions of "telephone toll service" and "telephone exchange service," should be applied in the CMRS context. We also seek comment on whether a nationwide wide-area calling plan would be a telephone exchange service pursuant to section 3(47) of the Act; whether the Commission should define this term for rate integration purposes; or whether, as alleged by some, the definition should be left to the discretion of CMRS providers. Parties should discuss the competitive implications of the alternative positions.

5. We invite parties to comment on alternative ways of implementing rate integration in the wide-area calling plan context to foster customer choice, pricing flexibility, and competitive development of the industry. Specifically, what must a CMRS provider do in offering wide-area plans to comply with rate integration requirements? To assist us in this effort, we invite parties to document the types of wide-area calling plans that are available, including the range of plans that individual CMRS carriers offer. We are particularly interested in

comparisons between regional and nationwide plans. In addition, parties should indicate whether these wide-area plans encompass Alaska, Hawaii, and the U.S. territories and possessions. Parties are asked to discuss whether the existence of a basic plan with separate interexchange charges at integrated rates, or the availability of dial-around to reach a long-distance carrier with integrated rates, would warrant either minimal regulation of, or forbearance from regulating, wide-area calling plans pursuant to section 254(g).

6. We also seek comment on how to evaluate multiple wide-area calling plans offered by a CMRS provider. Are there criteria that could be applied that would permit a variety of such plans to exist, while still complying with the rate integration requirement? If a CMRS provider offers wide-area calling plans, we invite parties to address whether it should be required to offer at least one such plan that serves all locations. Parties should comment on whether an approach that prohibited special rate categories for calls to non-contiguous insular points on a market-by-market basis, as suggested by PrimeCo, would be sufficient to prevent discrimination. Parties should focus on how any proposed approach to the treatment of wide-area calling plans balances the objective of fostering competitive market conditions with the goals of rate integration. Finally, we ask that parties discuss the implications of each approach for other policies applicable to CMRS providers.

7. Alternatively, we seek comment on whether forbearance from the application of rate integration to wide-area calling plans is appropriate. Parties are invited to comment on whether the conditions in the CMRS market are such that the requirements of section 10 would be satisfied. Finally, we seek comment on the extent to which the continued applicability of sections 201(b) and 202(a) of the Act is sufficient to protect against discriminatory or unreasonable rates; and, on the impact of specific proposals on small business entities, including new entrants.

B. Affiliation Requirements

8. The Commission's rate integration policy has always required rate integration across affiliates. We tentatively conclude that an interpretation of section 254(g), consistent with this prior policy, that requires rate integration across affiliates is also consistent with the Congressional intent of section 254(g).

9. In the *Rate Integration Reconsideration Order*, we specified that the current definitions of "affiliate"

and "control" in section 32.9000 of the Commission's rules will be used to determine whether companies are sufficiently related to require them to integrate their rates. Thus, we required affiliates under common ownership and control to integrate their rates. We observed that these definitions will permit application of rate integration to closely related affiliates while excluding those not under common control.

10. CMRS providers assert that the affiliation rule is unworkable and could produce anticompetitive results. They state that CMRS ownership arrangements are complicated, typically including partnership arrangements among carriers that are often competitors in other markets. Several CMRS providers assert that the current affiliation requirement would force all related carriers to adopt identical rates and rate structures, thereby preventing CMRS providers from responding to competition and depriving customers of the benefits of pricing flexibility and customer choice associated with the detariffed CMRS environment.

11. A workable affiliation rule is essential to preclude CMRS providers from evading the rate integration requirement of section 254(g) by the simple process of creating separate, affiliated companies to serve different geographic areas. We recognize, however, that too stringent an affiliation rule could be unworkable and adversely effect pricing and customer choice, because of the complex nature of the CMRS market. We invite parties to propose the appropriate affiliation requirement. We request parties to address the following affiliation standards: (1) fifty-one percent or greater ownership control; and (2) eighty percent ownership control resulting in accounting on a consolidated basis. Parties should discuss how positive or negative control should affect the analysis. Parties also are asked to identify CMRS providers serving Alaska, Hawaii, and the U.S. territories and possessions that would be affected by different affiliation standards. We invite parties to suggest other affiliation standards that they believe are more workable. Finally, we seek comment on the nature of the fiduciary duty owed by a controlling partner to its partners, how that duty would be affected by application of the statutory requirements of section 254(g), and how that duty should affect the level of affiliation required to trigger rate integration requirements in the CMRS industry.

12. We also seek comment on whether conditions in the CMRS market warrant forbearance from application of the

affiliation requirement under section 10 of the Act. Parties should address how each element of the forbearance standard is met. Finally, parties should address the extent to which any affiliate standard they propose affects small business entities, including new entrants.

C. Plans That Assess a Local Airtime or Roaming Charge Plus Separate Long-Distance Charges for Interstate, Interexchange Services

13. In this section, we seek further comment on the effects of the rate integration requirement of section 254(g) on the airtime or roaming charges associated with interstate, interexchange calls for which a separate long-distance charge is assessed. Airtime and roaming charges may be viewed in one or more ways. For example, airtime and roaming charges could be viewed as not interexchange in character and, therefore, not subject to rate integration, if the charges do not vary with the local or toll nature of the call. Alternatively, airtime and roaming charges could be viewed as part of the price for the long-distance call and, therefore, subject to the rate integration requirement. We request comment on the legal and policy implications of the alternatives described above. Parties also should discuss any interrelationships with the definition of "exchange" and "interexchange," discussed above in conjunction with the consideration of wide-area calling plans.

14. The local airtime or roaming charge assessed for a purely local call generally is the same as that assessed in connection with a toll call. That charge may vary from calling area to calling area because of differences in market conditions, just as exchange rates of incumbent LECs may vary among exchanges. Traffic, which involves no interstate, interexchange component, is not subject to rate integration. If airtime and roaming charges are subjected to rate integration, CMRS providers claim that they would be forced to assess the same airtime and roaming charge in all locations. Several parties noted that such a requirement could affect CMRS providers' ability to respond to competition or to offer customers a variety of pricing options. We seek comment on the ability of CMRS providers to impose separate, uniform airtime and roaming charges when a call is an interstate, interexchange call. To assist us in evaluating the implications of the application of rate integration to airtime and roaming charges, parties should provide detailed information on the percentage of calls and minutes that are local in nature as opposed to the

percentage of calls and minutes that are toll.

15. CMRS providers state that airtime and roaming charges primarily reflect local market conditions. They allege that costs do not vary as widely as costs vary for exchange carriers, and that CMRS rates do not include subsidies that support high exchange costs. We ask parties to address the extent of any cost difference between the contiguous states and Hawaii, Alaska, and the covered U.S. territories and possessions, and to submit demonstrative evidence supporting their cost difference data. Parties also should address the extent to which any options they propose would affect small business entities, including new entrants.

16. Finally, we ask parties to comment on whether, if we determine that airtime and roaming charges are properly part of an interstate, interexchange call, we should forbear from applying the rate integration requirement of section 254(g) to those airtime and roaming charges. Parties urging forbearance should discuss the standards of section 10 of the Act and how each element of the forbearance analysis is met. Parties also should discuss the effect of the continued applicability of sections 201, 202, and 208 on the forbearance analysis. In particular, we ask parties to discuss the extent to which those sections will protect consumers in a less than fully competitive market.

D. Integration of Cellular and PCS Services

17. We invite parties to comment on whether the rates of cellular and broadband PCS services should be integrated. Parties should discuss any similarities or differences in the operation of cellular and PCS networks, as well as customer perceptions of the two types of services. Parties also are asked to suggest other similarities or differences that should affect our decision as to whether cellular and PCS services should be rate integrated. We invite parties to discuss the effect that requiring these services to integrate their rates would have on the intent, in part, that PCS service provide competition to cellular service. In addition, we ask parties to comment on whether their position differs if the CMRS provider uses an integrated cellular and PCS network to provide a single CMRS service or if the CMRS provider offers separate cellular and PCS services using distinct cellular and PCS facilities. Finally, we invite parties to address the extent to which a requirement to integrate the rates of cellular and PCS services would affect

small business entities, including new entrants.

III. Procedural Matters

A. Ex Parte Presentations

18. The *Notice* is a permit-but-disclose proceeding and is subject to the permit-but-disclose requirements under 47 CFR 1.1206(b), as revised. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See also 47 CFR 1.1206(b).

B. Paperwork Reduction Act

19. The *Notice* has been analyzed with respect to the Paperwork Reduction Act of 1995, Public Law 104-13, and does not contain new or modified information collections subject to Office of Management and Budget review.

C. Initial Regulatory Flexibility Act Analysis

20. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the proposals suggested in this *Notice*. The analysis is set forth at the end of this summary. Written public comments are requested on the IRFA. Comments and reply comments must be identified by a separate and distinct heading as responses to the IRFA and must be filed on or before May 27, 1999 and June 28, 1999, respectively. Parties should address the extent to which our proposals affect large and small CMRS providers differently and how small business entities, including new entrants, will be affected. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the RFA. In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.

D. Comment and Reply Comment Filing Dates and Procedures

21. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before May 27, 1999, and reply comments on or before June 28, 1999. Comments may be filed using the Commission's Electronic Comment

Filing System (ECFS) or by filing paper copies.

22. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Only one copy of the electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, including "get form <your e-mail address>" in the body of the message. A sample form and directions will be sent in reply.

23. Parties that choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth St., S.W., Room TW-A325, Washington, DC 20554.

24. Parties that choose to file by paper should also submit their comments on diskette. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the docket number in this case, CC Docket No. 96-61); type of pleading (comment or reply comment); date of submission; and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy—Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, DC 20036.

IV. Ordering Clauses

25. Accordingly, *it is ordered*, pursuant to sections 1-4, 201-202, 254, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151-154, 201-202, 254, 303(r) and 403, that notice is hereby given of the rulemaking described above and that comment is sought on these issues.

26. *It is further ordered* that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis,

to the Chief Counsel for Advocacy of the Small Business Administration.

V. Initial Regulatory Flexibility Act Analysis

27. As required by the RFA, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Notice*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided above. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

A. Need for, and Objectives of, the Proposed Rules

28. In the 1996 Act, Congress directed the Commission to develop rules implementing the provisions of section 254(g) within six months of its enactment. The Commission adopted broad rules implementing the provisions of section 254(g) in the *Rate Integration Order*. In the *Notice*, we seek comment on how the rate integration requirement of section 254(g) should be applied to certain interstate, interexchange offerings of CMRS providers. The objective is to develop rate integration policies for CMRS providers that address the conditions in the CMRS marketplace, while fulfilling the rate integration objective of section 254(g).

B. Legal Basis

29. The proposed action is authorized by 47 U.S.C. 151–154, 201–202, 254, 303(r) and 403.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

30. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

(a) Cellular Radio Telephone Service

31. The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. According to the 1992 Census, which is the most recent information available, only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Therefore, even if all 12 of these large firms were cellular telephone companies, all of the remainder were small businesses under the SBA’s definition. Although there are 1,758 cellular licenses, we do not know the number of cellular licensees, since a cellular licensee may own several licenses. We assume that, for purposes of our evaluations in this IRFA, all of the current cellular licensees are small entities, as that term is defined by the SBA.

(b) Broadband Personal Communications Service

32. The broadband PCS spectrum is divided into six frequency blocks designated A through F. Pursuant to section 24.720(b) of the Commission’s Rules, the Commission has defined “small entity” for Block C and Block F licensees as firms that had average gross revenues of less than \$40 million in the three previous calendar years. This regulation defining “small entity” in the context of broadband PCS auctions has been approved by the SBA.

33. The Commission has auctioned broadband PCS licenses in all of its spectrum blocks A through F. We do not have sufficient data to determine how many small businesses under the Commission’s definition bid successfully for licenses in Blocks A and B. As of now, there are 90 non-defaulting winning bidders that qualify as small entities in the Block C auction and 93 non-defaulting winning bidders that qualify as small entities in the D, E, and F Block auctions. Based on this information, we conclude that the number of broadband PCS licensees that would be affected by the proposals in this *Notice* includes the 183 non-defaulting winning bidders that qualify as small entities in the C, D, E, and F Block broadband PCS auctions.

(c) Specialized Mobile Radio

34. Pursuant to section 90.814(b)(1) of the Commission’s Rules, the Commission has defined “small entity”

for geographic area 800 MHz and 900 MHz SMR licenses as firms that had average gross revenues of no more than \$15 million in the three previous calendar years. This regulation defining “small entity” in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.

35. The proposals set forth in the *Notice* may apply to SMR providers in the 800 MHz and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service, nor how many of these providers have annual revenues of no more than \$15 million.

36. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities under the Commission’s definition in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the proposals set forth in this *Notice* includes these 60 small entities.

37. A total of 525 licenses were auctioned for the upper 200 channels in the 800 MHz geographic area SMR auction. There were 62 qualifying bidders, of which 52 were small businesses. The Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis to estimate, moreover, how many small entities within the SBA’s definition will win these lower channel licenses. We assume that, for purposes of our evaluations in this IRFA, all of the current specialized mobile radio licensees are small entities, as that term is defined by the SBA.

(d) 220 MHz Service

38. The Commission has classified providers of 220 MHz service into Phase I and Phase II licensees. There are approximately 2,800 non-nationwide Phase I licensees and 4 nationwide licensees currently authorized to operate in the 220 MHz band. The Commission recently conducted the Phase II auction. There were 54 qualified bidders, of which 47 were small businesses.

39. At this time, however, there is no basis upon which to estimate definitively the number of phase I 220 MHz service licensees that are small businesses. To estimate the number of such entities that are small businesses, we apply the definition of a small entity under SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing

no more than 1,500 persons. According to the 1992 Census, which is the most recent information available, only 12 out of a total 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees—and these may or may not be small entities, depending on whether they employed no more than 1,500 employees. But 1,166 radiotelephone firms had fewer than 1,000 employees and therefore, under the SBA definition, are small entities. However, we do not know how many of these 1,166 firms are likely to be involved in the phase I 220 MHz service.

(e) Mobile Satellite Services (MSS)

40. The Commission has not developed a definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified (NEC). This definition provides that a small entity is expressed as one with \$11.0 million or less in annual receipts. According to the Census Bureau, there were a total of 848 communications services, NEC in operation in 1992, and a total of 775 had annual receipts of less than \$9.999 million.

41. Mobile Satellite Services or Mobile Satellite Earth Stations are intended to be used while in motion or during halts at unspecified points. These stations operate as part of a network that includes a fixed hub or stations. The stations that are capable of transmitting while a platform is moving are included under section 20.7(c) of the Commission's Rules as mobile services within the meaning of sections 3(27) and 332 of the Communications Act. Those MSS services are treated as CMRS if they connect to the Public Switched Network (PSN) and also satisfy other criteria of section 332. Facilities provided through a transportable platform that cannot move when the communications service is offered are excluded from section 20.7(c).

42. The MSS networks may provide a variety of land, maritime and aeronautical voice and data services. There are eight mobile satellite licensees. At this time, we are unable to make a precise estimate of the number of small businesses that are mobile satellite earth station licensees.

(f) Paging Services

43. The Commission has adopted a two-tier definition of small businesses in the context of auctioning licenses in the paging service. A small business is defined as either (1) a entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. The SBA has approved this definition for paging companies.

44. The Commission estimates that the total current number of paging carriers is approximately 600. In addition, the Commission anticipates that a total of 16,630 non-nationwide geographic area licenses will be granted or auctioned. The geographic area licenses will consist of 2,550 Major Trading Area (MTA) licenses and 14,080 Economic Area (EA) licenses. In addition to the 47 Rand McNally MTAs, the Commission is licensing Alaska as a separate MTA and adding three MTAs for the U.S. territories, for a total of 51 MTAs. No auctions of paging licenses have been held yet, and there is no basis to determine the number of licenses that will be awarded to small entities. Given the fact that no reliable estimate of the number of paging licensees can be made, we assume, for purposes of this IRFA, that all of the current licensees and the 16,630 geographic area paging licensees either are or will consist of small entities, as that term is defined by the SBA.

(g) Narrowband PCS

45. The Commission has auctioned nationwide and regional licenses for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition. At present, there have been no auctions held for the MTA and Basic Trading Area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licensees and 2,958 BTA licensees will be awarded in the auctions. Those auctions, however, have not yet been scheduled. Given that nearly all radiotelephone companies have fewer than 1,500 employees and

that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, that all of the licensees will be awarded to small entities, as that term is defined by the SBA.

(h) Air-Ground Radiotelephone Service

46. The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service, which is defined in section 22.99 of the Commission's rules. Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

47. We project that any rules adopted in response to the Notice will impose no significant new reporting or recordkeeping requirements on CMRS providers. CMRS providers will, of course, have to comply with any rate integration requirements that may be adopted in a final order. As part of that requirement, they may have to integrate their rates with those of specified affiliates.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

48. Throughout this Notice, we seek comment on the impact of the proposals in the Notice on small entities. We also seek comment on whether we should forbear from applying any of the rate integration requirements on which comment is sought to CMRS providers.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

49. None.

List of Subjects in 47 CFR Part 64

Communications common carriers.
Federal Communications Commission.

Magalie Roman Salas,
Secretary.

[FR Doc. 99-12410 Filed 5-17-99; 8:45 am]

BILLING CODE 6712-01-U

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of Public Information Collection Requirements Submitted to OMB for Review

SUMMARY: U.S. Agency for International Development (USAID) has submitted the following information collections to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments regarding this information collection are best assured of having their full effect if received within 30 days of this notification. Comments should be addressed to: Desk Officer for USAID, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington D.C. 20503. Copies of submission may be obtained by calling (202) 712-1365.

SUPPLEMENTARY INFORMATION:

OMB Number: OMB 0412-0004.

Form Number: AID 11.

Title: Application for approval of Commodity Eligibility. Instruction Books for the Organization Profile. Type of USAID provides loans and grants to some developing countries in the form of Commodity Import Programs (CIPs). These funds are made available to host countries to be allocated to the public and private sectors for purchasing various commodities from the U.S., or in some cases, from other developing countries. In accordance with Section 604(f) of the Foreign Assistance Act of 1961, as amended, USAID may finance only those commodities which are determined eligible and suitable in accordance with various statutory requirements and agency policies. Using the Application for Approval of Commodity Eligibility (Form AID 11), the supplier certifies to USAID information about the commodities being supplied, as required in section 604(f), so that USAID may determine eligibility.

Annual Reporting Burden:

Respondents: 365 (twice a year)
Total annual responses: 730.
Total annual hours requested: 365 hours.

Dated: May 11, 1999.

Willette L. Smith,

*Chief, Information and Records Division,
Office of Administrative Services, Bureau for
Management.*

[FR Doc. 99-12418 Filed 5-17-99; 8:45 am]

BILLING CODE 6116-01-M

DEPARTMENT OF COMMERCE

Bureau of the Census

Business and Professional Classification Report

ACTION: Proposed collection; comment request

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before July 19, 1999.

ADDRESSES: Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 5033, 14th and Constitution Avenue, NW, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Carol S. King, Bureau of the Census, Room 2651-3, Washington, DC 20233, (301) 457-2675.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau sponsors the SQ-CLASS, "Business and Professional Classification Report", to collect information needed to keep the retail, wholesale, and service samples current with the business universe. The form was previously known as B-625 (97). Because of rapid changes in the marketplace caused by the emergence of new businesses, the deaths of others,

transfer of ownership, mergers, and so forth, on a quarterly basis the Bureau of the Census canvasses a sample of new Employer Identification Numbers (EINs) obtained from the Internal Revenue Service (IRS) and the Social Security Administration (SSA). Each selected firm is canvassed once for kind of business classification, measure of size, and company affiliation on the establishments associated with the new EIN. In essence, from the perspective of the business firm, this is a one time collection of data. A different sample of EINs is canvassed four times a year.

We are revising the SQ-CLASS to better assign kind-of-business codes based on the North American Industry Classification System (NAICS). This includes collection of additional information on method of selling which is a key component for ensuring correct NAICS classification.

(Occupational Employment Statistics Bureau of Labor Statistics, 199 National Occupational Employment and Wage Data Professional, Paraprofessional, and Technical Occupations, \$17.66 represents the median hourly wage of the full-time wage and salary earnings of accountants and auditors) [http:// stats.bls.gov/oes/national/oes_prof.htm](http://stats.bls.gov/oes/national/oes_prof.htm)

Respondent's Obligation: Voluntary.

Authority: Title 13, United States Code, Section 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They also will become a matter of public record.

II. Method of Collection

We collect this information by mail, fax, and telephone follow-up.

III. Data

OMB Number: 0607-0189.

Form Number: SQ-CLASS.

Type of Review: Regular Submission.

Affected Public: Retail, Wholesale and Service firms in the United States.

Estimated Number of Respondents: Annually, approximately 42,000.

Estimated Time Per Response: 13 minutes.

Estimated Total Annual Burden Hours: 9,101.

Estimated Total Annual Cost: The cost to the respondent for fiscal year 2000 is estimated to be \$160,724 based on the median hourly salary of \$17.66 for accountants and auditors.

Dated: May 7, 1999.

Linda Engelmeier,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 99-12196 Filed 5-17-99; 8:45 am]

BILLING CODE 3510-07-U

DEPARTMENT OF COMMERCE**Foreign-Trade Zones Board**

[Docket 20-99]

Foreign-Trade Zone 114—Peoria, Illinois; Application for Foreign-Trade Subzone Status; E.I. du Pont de Nemours and Company, Inc. (Crop Protection Products), El Paso, Illinois

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Economic Development Council, Inc. (of Peoria, Illinois), grantee of FTZ 114, requesting special-purpose subzone status for the manufacturing facilities (crop production products) of E.I. du Pont de Nemours and Company, Inc. (Du Pont), located in El Paso, Illinois. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally filed on May 7, 1999.

The DuPont facilities (49.2 acres, 320,512 sq. ft. + 240,000 sq. ft. proposed) are located at on U.S. Highway 24 East in El Paso, Illinois. The facilities (150 employees) produce herbicide products for crop protection. DuPont initially intends to manufacture, test, package, and warehouse sulfonylurea herbicides under FTZ procedures. The herbicides to be produced are marketed under the following trade names: Accent®, Accent Gold® Basis®, Basis Gold®, Classic®,

Canopy®, Canopy XL®, Pinnacle®, and Reliance®. Foreign-sourced materials will account for, on average, 14 to 18 percent of finished products' value. Dupont has indicated that the following inputs will be imported, or transferred under FTZ procedures from the proposed subzone of DuPont Agricultural Caribe Industries, Ltd. (in Manatí, Puerto Rico): nicosulfuron; rimsulfuron; thifensulfuron methyl; and chlorimuron ethyl (the duty rate on these is 10.0%). The application also indicates that the company may in the future import under FTZ procedures a wide variety of other chemical materials, as well as other products used in production, packaging, and distribution of crop protection products.

Zone procedures would exempt DuPont from Customs duty payments on foreign materials used in production for export. On domestic shipments, the company would be able to defer Customs duty payments on foreign materials, and to choose the duty rate that applies to the finished products (6.5%) instead of the rate otherwise applicable to the foreign input materials (noted above). The company would also be exempt from duty payments on foreign merchandise that becomes scrap/waste. FTZ status may also make a site eligible for benefits provided under state/local programs. The application indicates that the savings from zone procedures would help improve the plant's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is July 19, 1999. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to August 2, 1999.

A copy of the application and the accompanying exhibits will be available for public inspection at each of the following locations:

Office of the Executive Secretary,
Foreign-Trade Zones Board, U.S.
Department of Commerce, Room
3716, 14th and Pennsylvania Avenue,
N.W., Washington, D.C. 20230
U.S. Customs Service, 5701 W.
Smithville Rd., Air Cargo Facility,
Suite 700, Bartonville, IL 61607-1778

Dated: May 7, 1999.

Dennis Puccinelli,

Acting Executive Secretary.

[FR Doc. 99-12506 Filed 5-17-99; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE**Foreign-Trade Zones Board**

(Docket 19-99)

Foreign-Trade Zone 93—Durham, North Carolina; Application For Foreign-Trade Subzone Status; Philips Monitor Raleigh (Computer Monitors and Related Peripheral Products), Durham, NC

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Triangle J Council of Governments, grantee of FTZ 93, requesting special-purpose subzone status for the manufacturing facilities (computer monitors and related peripheral products) of Philips Monitor Raleigh (Philips), located at sites in the Durham, North Carolina, area. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally filed on May 6, 1999.

The Philips facilities (16 acres, 168,000 sq. ft.) are located at 627 and 701 Distribution Drive, Durham, North Carolina. The facilities (200 employees) are currently used for the manufacture of computer monitors. The application indicates that products which may be produced at the plant in the future include: computer keyboards; computer speakers (internal and external); computer video cameras (internal and external); computer microphones (internal and external); USB hubs, ports, cables and connectors; "ultra-thin clients;" LCD monitors; and computer mice. Some of the components used in manufacturing computer monitors are purchased from abroad (an estimated 63% of finished product value), including connectors, screws, knobs, springs, metal plates, brackets, cable ties, lenses, sliders, wire harnesses, power cords, degauss coils, cables, and cathode ray tubes (duty rates on these items range from 1.9% to 6.5%). The company also uses a number of foreign-sourced items that are duty free.

Zone procedures would exempt Philips from Customs duty payments on foreign components used in export production. On domestic shipments, the company would be able to defer Customs duty payments on foreign materials, and to choose the duty rate

that applies to the finished products (computer monitors are duty free) instead of the rates otherwise applicable to the foreign input materials (noted above). The company would also be exempt from duty payments on foreign merchandise that becomes scrap/waste. FTZ procedures will help Philips to implement a more cost-effective system for handling Customs requirements (including reduced brokerage fees and Customs merchandise processing fees). FTZ status may also make a site eligible for benefits provided under state/local programs. The application indicates that the savings from zone procedures would help improve the plant's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is July 19, 1999. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to August 2, 1999.

A copy of the application and the accompanying exhibits will be available for public inspection at each of the following locations:

Office of the Executive Secretary,
Foreign-Trade Zones Board, U.S.
Department of Commerce, Room
3716, 14th and Pennsylvania Avenue,
N.W., Washington, D.C. 20230
U.S. Department of Commerce Export
Assistance Center, 400 West Market
Street, Suite 102, Greensboro, NC
27401

Dated: May 6, 1999.

Dennis Puccinelli,

Acting Executive Secretary.

[FR Doc. 99-12505 Filed 5-17-99; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 21-99]

**Foreign-Trade Zone 7—Mayaguez,
Puerto Rico; Application for Foreign-
Trade Subzone Status; DuPoint
Agricultural Caribe Industries, Ltd.
(Crop Protection Products), Manatí,
Puerto Rico**

An application has been submitted to the Foreign-Trade Zones Board (the

Board) by the Puerto Rico Industrial Development Company, grantee of FTZ 7, requesting special-purpose subzone status for the manufacturing facilities (crop protection products) of DuPoint Agricultural Caribe Industries, Ltd. (DACI), located in Manatí, Puerto Rico. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally filed on May 7, 1999.

The DACI facilities (458.5 acres, 797,000 sq. ft.+235,000 sq. ft proposed) are located at Km 2.3, State Road 686, Manti, Puerto Rico. The facilities (695 employees) produce herbicide products for crop protection. DACI indicates that it intends to manufacture, test, package, and warehouse under FTZ procedures sulfonyleurea herbicides, as well as "technical" to be used by the E.I. du Pont de Nemours and Company, Inc., plant in El Paso, Illinois for the production of such herbicides. The herbicides which may be produced at the Manatí facility are marketed under the following trade names:

Accent®Accent Gold®, Basis®,Basis Gold®, Pinnacle®, Reliance®, Classic®, Canopy®, Canopy XL®, Granstar®, Express®, Ally®, Escort®, Glean®, Harmony®, Harmony Extra®, Refine®, Finesse®, Londax®, Gulliver®, and Canvas®. Foreign-sourced materials will account for, on average, 13 to 17 percent of the finished products' value. DACI indicates that the foreign-sourced inputs are as follows: 2-methyl-5-methoxy-6-methylamino-1,3,5-triazine;2-(isocyanatosulfonyl)-benzoic acid, methyl; 2-Amino-4-methoxy-6-methyl-1,3,5-triazine; 3-(isocyanatosulfonyl)-2-thiophenecarboxylic acid, methyl ester; 2-chloro-benzenesulfonyl isocyanate; 2-Amino-4,6-dimethoxypyrimidine; 2-[(isocyanatosulfonyl) methyl]-benzoic acid, methyl ester; (4,6-dimethoxypyrimidin-2-yl) carbamic acid, phenyl ester; 1-methyl-4-[2-methyl-2H-tetrazol-5-yl]-1H-pyrazole-5-sulfonamide; 4,6-dimethyl-2-pyrimidinamine; phenyl (3-((dimethylamino)carbonyl)-2-pyridinylsulfonyl)carbamate; 3-(ethylsulfonyl)-2-pyridinesulfonamide; 2-(isocyanatosulfonyl)-benzoic acid, ethyl ester; and 2-amino-4-chloro-6-methoxypyrimidine (duty rates on these items range from duty free to 10.0%+1.8¢/kg.). This application also indicates that the company may in the future import under FTZ procedures a wide variety of other chemical materials, as well as other products used in production, packaging, and distribution of crop protection products.

Zone procedures would exempt DACI from Customs duty payments on foreign materials used in production for export. On domestic shipments, the company would be able to defer Customs duty payments on foreign materials, and to choose the duty rate that applies to the finished products (6.5%–10%) instead of the rates otherwise applicable to the foreign input materials (noted above). The company would also be exempt from duty payments on foreign merchandise that becomes scrap/waste. FTZ status may also make a site eligible for benefits provided under state/local programs. The application indicates that the savings from zone procedures would help improve the plant's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is July 19, 1999. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to August 2, 1999.

A copy of the application and the accompanying exhibits will be available for public inspection at each of the following locations:

Office of the Executive Secretary,
Foreign-Trade Zones Board, U.S.
Department of Commerce, Room
3716, 14th and Pennsylvania Avenue,
N.W., Washington, D.C. 20230
U.S. Department of Commerce Export
Assistance Center, 525 F.D. Roosevelt
Avenue, Suite 905, San Juan, PR
00918

Dated: May 7, 1999.

Dennis Puccinelli,

Acting Executive Secretary.

[FR Doc. 99-12507 Filed 5-17-99; 8:45 am]

BILLING CODE 3510-SD-M

DEPARTMENT OF COMMERCE

International Trade Administration

[A-201-504]

**Porcelain-on-Steel Cookware from
Mexico: Final Results of Antidumping
Duty Administrative Review**

AGENCY: Import Administration,
International Trade Administration,
Department of Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Review.

SUMMARY: On January 11, 1999, the Department of Commerce published the preliminary results of the administrative review of the antidumping duty order on certain porcelain-on-steel cookware from Mexico (64 FR 1592). This review, the eleventh review of this order, covers Cinsa, S.A. de C.V. and Esmaltaciones de Norte America, S.A. de C.V., manufacturers/exporters of the subject merchandise to the United States and the period December 1, 1996, through November 30, 1997. We gave interested parties an opportunity to comment on the preliminary results. Based on our analysis of the comments received and the correction of certain clerical errors, the final results differ from the preliminary results. The final results are listed below in the "Final Results of Review" section of this notice.

EFFECTIVE DATE: May 18, 1999.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or David J. Goldberger, Office 5, AD/CVD Enforcement Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, telephone: (202) 482-4929 or (202) 482-4136, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 11, 1999, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of the 1996-97 administrative review of the antidumping duty order on certain porcelain-on-steel (POS) cookware from Mexico (64 FR 1592) (*preliminary results*). On February 1, 1999, Cinsa, S.A. de C.V. (Cinsa) and Esmaltaciones de Norte America, S.A. de C.V. (ENASA) filed comments in an attempt to rebut the presumption of reimbursement of antidumping duties with respect to eleventh review entries, pursuant to the opportunity afforded respondents by the Department in its preliminary results **Federal Register** notice. On February 16, 1999, petitioner filed comments on the information submitted by respondents. On March 12, 1999, and March 19, 1999, Columbian Home Products, LLC (CHP) (the petitioner), Cinsa and ENASA submitted case and rebuttal briefs, respectively. The Department held a hearing on March 26, 1999. The Department has now completed its administrative review in accordance

with section 751 of the Tariff Act of 1930, as amended.

Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations at 19 CFR Part 351 (1998).

Scope of the Review

Imports covered by this review are shipments of porcelain-on-steel cookware, including tea kettles, which do not have self-contained electric heating elements. All of the foregoing are constructed of steel and are enameled or glazed with vitreous glasses. This merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 7323.94.00. Kitchenware currently classifiable under HTSUS subheading 7323.94.00.30 is not subject to the order. Although the HTSUS subheadings are provided for convenience and Customs purposes, our written description of the scope of this proceeding is dispositive.

Changes Since the Preliminary Results

We have made the following changes in these final results for both Cinsa and ENASA, unless otherwise noted:

1. We revised the preliminary results frit calculation. See Comment 2, below.
2. We recalculated Cinsa International Corporation's (CIC's) indirect selling expenses. See Comment 4, below.
3. We corrected a misplaced decimal point in the BILLADJU (billing adjustment) variable in the sales listing.
4. For Cinsa, we included the startup costs associated with the acquisition of Acero Porcelanizado, S.A. (APSA) in cost of manufacturing (COM) as opposed to general and administrative (G&A) expenses.
5. We deducted repacking expenses incurred in the United States by CIC as a direct selling expense. See Comment 5, below.
6. For sales reported without cost of production (COP) data, we assigned the average COP reported for other sales in the database.

Interested Party Comments

Comment 1: Alleged Reimbursement of U.S. Affiliate CIC for Antidumping Duties. Respondents argue that the Department erred in finding that the April 1997 capital contribution by

Grupo Industrial Saltillo (GIS), Cinsa's and ENASA's affiliated holding company, to CIC, respondents' affiliated importer, constituted reimbursement within the meaning of the Department's regulations. The respondents claim that (1) there was no direct payment of CIC's antidumping duty liability by Cinsa or ENASA; (2) there was no direct reimbursement of antidumping duties paid by Cinsa or ENASA; and (3) there was no indirect reimbursement of CIC's antidumping duty liability by Cinsa or ENASA.

In addition, respondents contend that 19 CFR § 351.402(f)(1) specifically states that "reimbursement" occurs only when the reimbursement is made to the importer by the exporter or producer, and that the Department has always applied the plain language of this regulation strictly and literally. Respondents further argue that the Courts and the Department have uniformly limited application of the reimbursement regulation to payments by exporters or producers. Respondents assert that, as the Department has previously stated, it could have written a reimbursement regulation explicitly covering payments "on behalf of" or "attributable to" a producer or exporter. Moreover, according to respondents, it is the Department's well-established policy to recognize separate corporate identities, and the Court of International Trade, in *Outokumpu Copper Rolled Products AB v. United States* ("Outokumpu"), 829 F. Supp. 1371 (1993), rejected the theory that it should "collapse" the related parties involved to find reimbursement. Respondents state that the Department itself, in the context of the ninth review litigation, recognized the administrative burden that would be created for the Department if the regulation covered reimbursement by all entities within a corporate family. Respondents note that, in the context of the same litigation, The Department recognized that Congress had specifically rejected the "duty as a cost" theory. As a result, respondents claim, the Department cannot argue that payments made "on behalf of" or payments "attributable to" an exporter or producer can constitute reimbursement within the meaning of the regulation.

Respondents also claim that the Department's new interpretation of the reimbursement regulation is not simply a "policy change," but rather the promulgation of a new substantive rule without satisfying the notice and comment requirements of the Administrative Procedures Act (APA). Moreover, according to respondents, this reinterpretation also violates the

APA because, they claim, the Department has applied its new policy to Cinsa and ENASA retroactively.

Finally, respondents argue that the Department lacked authority to impose a rebuttable presumption that eleventh review duties will be reimbursed, and that, even if the Department's application of its rebuttable presumption were proper, Cinsa and ENASA have submitted sufficient factual information to rebut any such presumption. Specifically, Cinsa and ENASA state that they have provided documentation establishing that: (1) CIC has refunded the April 1997 capital contribution using monies not supplied by any corporate affiliate; (2) CIC and its corporate affiliates have taken steps to ensure that it will not receive any future reimbursement within the terms of the Department's new interpretation of the regulation; and (3) CIC will be able to fund its future antidumping duty obligations through its own financial resources. Cinsa and ENASA state that, in prior administrative cases involving reimbursement, the Department has found lesser factual showings to constitute a rebuttal of a presumption of future reimbursement of antidumping duties.

Petitioner agrees with the Department's preliminary finding that Cinsa and ENASA reimbursed their affiliated U.S. importer for antidumping duties and argues that this finding should be affirmed for purposes of the final results. According to petitioner, Cinsa and ENASA concede that: (1) the payment to CIC was made; (2) the payment to CIC was made on behalf of the producers under review; and (3) CIC used the funds to pay antidumping duty assessments.

Petitioner also argues that the Department is entitled to reinterpret its reimbursement regulation in a manner that better effectuates the regulatory purpose. Petitioner contends that the Department has a special interest in being able to apply its reimbursement regulation flexibly so that it can address the many different factual situations that arise.

In addition, petitioner argues that, contrary to respondents' claim, the Department has not "collapsed" the respondents in this case. The Department's preliminary finding, according to petitioner, is that GIS made the reimbursement payment on behalf of Cinsa and ENASA, as opposed to a collapsed entity making the reimbursement payment. Furthermore, petitioner notes, the Department's new interpretation does not constitute the adoption of the "duty as a cost" theory because this case involves an

undisputed link between the payment of antidumping duties by the U.S. subsidiary and an intracorporate payment providing funds for this purpose.

With regard to the alleged violation of the APA, petitioner claims that the Department's preliminary results merely interpret the regulation; therefore, it involves a general statement of policy or an interpretive rule, neither of which is subject to the notice and comment requirements of the APA.

In addition, petitioner argues that the Department is permitted to apply its new interpretation of the reimbursement rule to the facts of this review. Petitioner believes that the Department's reinterpretation of the regulation in this review is an attempt to further develop an evolving policy with respect to reimbursement of antidumping duties between affiliated parties. According to petitioner, all the law requires is that the Department's change of position be in accordance with the statute and be based on a reasonable interpretation of the regulation. Furthermore, petitioner adds, Cinsa and ENASA could not have relied upon any prior interpretation of the regulation in making the April 1997 transaction, because the transaction itself occurred prior to the final determinations in the ninth and tenth reviews of the underlying order.

Finally, petitioner argues that, contrary to Cinsa's and ENASA's assertions, respondents have failed to rebut the presumption that CIC will continue to rely on reimbursements in order to meet its obligations to pay antidumping duties with respect to entries made during the eleventh period of review (POR). Petitioner claims that the new information submitted by Cinsa and ENASA does not establish "by clear and convincing evidence" (the standard set forth in the preliminary results) that CIC will not need to rely on reimbursements from its Mexican affiliates to satisfy its antidumping obligations. Specifically, petitioner states that: (1) both the repayment of the April 1997 transfer and the restructuring undertaken by CIC in 1998 have weakened CIC financially; (2) the corporate non-reimbursement resolutions are meaningless and should be disregarded; and (3) the evidence submitted in support of the contention that CIC will be able to fund its future antidumping obligations through its own financial resources amounts to little more than "overly-optimistic, self-serving projections." Petitioner also states that prior cases in which the Department determined that a party had rebutted the presumption of reimbursement involved (1) more

substantial changed circumstances and (2) only an agreement to reimburse, not the actual reimbursement characterizing this case.

DOC Position: We agree with petitioner that, for purposes of this review, the Department properly determined that the April 1997 capital contribution to CIC for purposes that included payment of antidumping duties on fifth and seventh review entries constituted reimbursement of antidumping duties within the meaning of 19 CFR § 351.402. We also agree with petitioner that, based on this history of actual reimbursement, the Department reasonably presumed that antidumping duties payable on the entries for this eleventh review likewise have been or will be reimbursed. Finally, we also agree with petitioner that Cinsa and ENASA have failed to adequately rebut the presumption that reimbursement has occurred or will occur with respect to eleventh review entries.

Interpretation of the Regulation

The reviews of this order have presented an issue of first impression. In the few other cases in which reimbursement has been addressed, the issue has most often been factual, i.e., whether there was evidence that reimbursement occurred. See, e.g., *Brass Sheet and Strip from the Netherlands: Final Results of Antidumping Duty Administrative Reviews*, 54 FR 9534, 9537 (March 19, 1992); *Color Television Receivers from the Republic of Korea: Final Results of Antidumping Duty Administrative Reviews ("Korean TVs")*, 61 FR 4408, 4410-11 (February 6, 1996). Outside the POS cookware reviews, the Department has interpreted the general scope of the regulation, i.e. what constitutes reimbursement, in only two situations: (1) we interpreted the regulation to cover reimbursement by an exporter that is affiliated with the importer (e.g., *Korean TVs*, 61 FR at 4410-11, *Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review*, 61 FR 48465, 48470 (September 13, 1996)), and (2) we interpreted the regulation as not applying when the exporter is also the importer (e.g., *Circular Welded Non-Alloy Steel Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review*, 63 FR 33041, 33044 (June 17, 1998)). This is the first case in which we have addressed the issue of whether reimbursement by a party acting on behalf of the exporter constituted reimbursement within the meaning of the regulation.

In the ninth and tenth reviews of this order, the Department found that funds provided to CIC by its ultimate parent, GIS, for the payment of antidumping duties on entries during the fifth and seventh review periods did not constitute reimbursement within the meaning of the regulation because neither GIS nor GIS/US is an exporter or producer. Specifically, we found that the facts merely established that there was an infusion into CIC by its parent and there was no evidence that the source of the funds was a producer or exporter of the subject merchandise. *Porcelain-on-Steel Cookware from Mexico; Final Results of Antidumping Duty Administrative Review*, 62 FR 42496, 42504 (August 7, 1997). While that decision is based on a permissible interpretation of the regulation, upon further reflection, as a matter of policy, the Department finds that interpretation too restrictive.

The Department may depart from its prior interpretation, provided it "articulates a reasoned basis" for doing so. *Hoogovens Staal, BV v. United States*, 4 F. Supp. 2d 1213, 1217, 1219 (1998) (upholding the Department's decision to apply the reimbursement regulation to related parties). We have a reasoned basis in this instance. The remedial effect of the antidumping law is defeated if importers are reimbursed for antidumping duties. Thus, the reimbursement regulation is designed to preserve the statute's remedial purpose. *Hoogovens*, 4 F. Supp. 2d at 1217. In this review, the Department for the first time considered whether the reimbursement regulation encompasses reimbursement by parties acting on behalf of the exporter or producer. We are departing from our prior interpretation of the reimbursement regulation in favor of an interpretation that takes into account situations in which reimbursement occurs indirectly, i.e., through someone acting on behalf of the exporter, because such an interpretation more effectively accomplishes the purposes of the regulation. A more literal and restrictive interpretation could seriously undermine the effectiveness of the regulation by making it possible to avoid its application merely by acting through third parties. Therefore, the Department interprets the reimbursement regulation to include reimbursement by parties acting on behalf of the exporter or producer.

As explained in the preliminary determination, GIS regularly manages funds on behalf of its various subsidiaries, including Cinsa and ENASA. In making the transfer in question, GIS acted for the benefit of

Cinsa and ENASA and their U.S. importation arm, CIC. CIC markets only products manufactured by Cinsa and ENASA; it does not market products for other members of the corporate family. Thus, only Cinsa and ENASA have a direct interest in assisting CIC in paying antidumping duties on POS cookware products. Based on these facts, taken as a whole, we find that when GIS transferred funds to CIC for the payment of antidumping duties, it was acting on behalf of Cinsa and ENASA. Therefore, consistent with the interpretation articulated in this review, the April 1997 payment to CIC constitutes reimbursement within the meaning of the regulation.

We disagree with respondents that finding that GIS acted "on behalf of" Cinsa and ENASA is tantamount to considering the entire GIS family of corporations to be a single "collapsed" entity. We have not collapsed the corporations involved, and it is not necessary to do so in order to find that one company acted on behalf of another. We also disagree with respondent's argument that our decision in this case is inconsistent with rejecting the concept of duty as a cost. A "duty as a cost" approach treats antidumping duties paid by the importer as an expense that should be automatically deducted from the U.S. price. In contrast, the reimbursement regulation does not require the deduction of antidumping duties paid by the importer. It only requires the deduction of antidumping duties paid by the exporter or producer on behalf of the importer or any amount the exporter or producer pays to the importer as reimbursement for antidumping duties. Moreover, our interpretation of the regulation does not rely on the principle of the fungibility of money or the so-called "holding company rule" *Cf. In the Matter of Porcelain-on-Steel Cookware From Mexico: Final Results of the Ninth Antidumping Duty Administrative Review*, Secretariat File No. USA-97-1904-07, at 7 (April 30, 1999) (agreeing with the Department that authorities relied upon for fungibility and holding company arguments for reimbursement did not relate to these concepts as applied in the context of reimbursement).

We also disagree with respondents' claim that the Department's broader interpretation of the regulation constitutes the promulgation of a new substantive rule, which requires compliance with the notice and comment requirements of the APA. There is an existing rule governing reimbursement by exporters and producers. We are not amending that

rule, we are merely interpreting it to cover reimbursement by parties acting on behalf of the exporter or producer. Such an "interpretive rule", i.e., a clarification or explanation of an existing regulation, may evolve over time, without the need for formal notice and comment, provided the Department explains the reasons for changes in its policies or practices, which we have done in this case. Furthermore, we note that respondents have availed themselves of the opportunity provided to comment on this interpretation following the preliminary determination.

The Department also disagrees with respondents' claim that application of the new policy in this review constitutes "retroactive" application in violation of the APA. "[T]he general principle is that when as an incident of its adjudicatory function, an agency interprets a statute, it may apply that new interpretation in the proceeding before it." *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, 826 F.2d 1074, 1081 (D.C. Cir. 1987), cert. denied, 485 U.S. 913 (1988). The same is true of applying a new interpretation of a regulation. Thus, application of the new policy in this review is permissible. The finding of prior reimbursement in this review does not alter the results of prior reviews in any respect. Therefore, we have not given the new policy retroactive effect. The finding of prior reimbursement is being addressed only to determine whether the reimbursement regulation should be applied in the current review. Furthermore, application of the regulation in this review does not create a "manifest injustice" as to respondents. *See Id.* First, the Department has no long-standing practice regarding reimbursement of antidumping duties by parties acting on behalf of the producer or exporter. Second, although the Department determined not to apply the reimbursement regulation in the final determinations of the ninth and tenth reviews of this order, the actions at issue here are not ones taken in reliance on the agency's decisions in those reviews. The reimbursement at issue here is the same as it was in the ninth and tenth reviews, i.e., the April 1997 transfer to CIC. Because the decisions in the ninth and tenth reviews were made after the April 1997 transfer, the parties could not have relied upon those findings when that transfer was made.

Use of a Rebuttable Presumption

The Department has previously stated that "where the Department determines in the final results of an administrative

review that an exporter or producer has engaged in the practice of reimbursing the importer, the Department will presume that the company has continued to engage in such activity in subsequent reviews, absent a demonstration to the contrary." *Dutch Steel 3rd Review*, 63 FR at 13213-14. "The establishment of a rebuttable presumption allows the Department to administer the law fairly and effectively." 63 FR at 13214. "The Department's policy is crafted to address the instances in which there has been a finding of reimbursement and the importer is financially unable to pay the duty on its own. In that circumstance, the Department will determine that the importer must continue to rely on reimbursements, such as intracorporate transfers, from the producer or exporter in order to meet its obligations to pay the duties." *Id.* Accordingly, based on our finding that GIS, acting on behalf of Cinsa and ENASA, reimbursed CIC for antidumping duties assessed on entries during the fifth and seventh review periods, the Department reasonably presumed that, absent evidence to the contrary, antidumping duties to be assessed on entries during the current review period would be reimbursed as well.

Respondents argue that such a rebuttable presumption is improper and unjustified because there is no such language in the regulation. However, no express grant of authority is required for the Department to employ a rebuttable presumption when implementing one of its regulations. Indeed, the Department has considerable discretion in interpreting and applying its own regulations.

Whether circumstances warrant reversing the presumption of reimbursement must be decided on a case-by-case basis. *Id.* In the preliminary determination for this eleventh review, the Department stated that, to rebut the presumption that reimbursement will continue to take place when current entries are liquidated, a respondent must normally demonstrate that, during the POR in question (in this case the eleventh POR), antidumping duties were assessed against the affiliated importer and the affiliated importer did in fact pay all antidumping duties assessed during that POR, without reimbursement, directly or indirectly, by the exporter/producer. In such a case, the importer's financial ability to pay antidumping duties during the current POR is sufficient evidence of the importer's ability, without reimbursement, to pay the antidumping duties to be assessed on entries during the current review. Alternatively,

respondents may rebut the presumption by demonstrating that there are changed circumstances (e.g., completed corporate restructuring) sufficient to obviate the need for reimbursement of antidumping duties to be assessed on the entries under review. We stated in the preliminary determination that this alternative means of rebuttal required "clear and convincing" evidence. However, because this alternative test is by nature speculative, we have concluded that a "clear and convincing" standard is inappropriate. Rather, the alternative is the test applied in the *Dutch Steel 3rd Review*; specifically, there must be evidence sufficient to satisfy the Department that the importer can be expected to pay antidumping duties to be assessed in the future without reimbursement. See 63 FR at 13213.

Because we determined in the current review that the April 1997 transfer constitutes reimbursement and because that transfer occurred during the current POR, Cinsa and ENASA cannot rebut the presumption of continuing reimbursement under the first alternative. Therefore, the Department opened the record for respondents to provide evidence sufficient to satisfy the Department that they can be expected to pay antidumping duties to be assessed in the future without reimbursement.

Respondents' Rebuttal Evidence

In order to establish that CIC is no longer being reimbursed for antidumping duties and that changed circumstances exist sufficient to obviate the need for reimbursement as to eleventh review entries when these entries are liquidated, respondents submitted documentation intended to establish the following:

- CIC has refunded to GIS/US the April 1997 capital contribution, using monies obtained based on its own resources, without reliance on monies or guarantees from its affiliates.
- CIC's Board of Directors has passed a resolution to the effect it will not accept from any company within the GIS group any monies, directly or indirectly, in any form, as reimbursement for any antidumping duties or duty deposits for which CIC may be liable. In addition, the Boards of Directors of the GIS companies have each resolved that they will not provide any such reimbursement. Respondents note that, under Article 157 of the Mexican corporate law, such resolutions have the authority to legally bind the company to a future course of action.
- CIC is expected to be able to fund its future antidumping duty obligations through its own financial resources. In

support of this argument, respondents submitted documentation detailing certain changes in the structure of CIC and an income statement and cash flow projection for the period 1999-2002 (when the eleventh review entries can reasonably be expected to be liquidated). Respondents also provided documentation as to the rationales supporting their income and expense projections.

CIC's return of the monies received as reimbursement and expressions of intent not to reimburse in the future, while supportive of a rebuttal argument, are not alone sufficient to provide the Department with adequate assurance to rebut the presumption that CIC will again require, and therefore again receive, reimbursement from its affiliates for the eleventh review entries. We agree with petitioner that the Board resolutions in question, even though they may currently be legally binding, could easily be reversed by different resolutions at some future date, and therefore provide little evidence that reimbursement will not recur at some future date. Therefore, the principal focus of our analysis of whether there are changed circumstances sufficient to allay our concerns with respect to reimbursement of the eleventh review entries must be on respondents' attempt to show that CIC will be financially able to pay these duties when they become due. After careful analysis, we must agree with the petitioner that CIC's projections of its financial future are unduly optimistic, and cannot be relied upon.

Respondents' claims that CIC's financial health will have improved sufficiently by 2002 to pay the duties on these entries have two primary bases. First, respondents claim that the June 1998 closure of CIC's San Antonio warehouse operation will allow it to achieve cost savings as compared to the time of the April 1997 transfer. These cost savings, however, could well be offset by sales losses due to the inability of CIC to fill orders from inventory quickly. Thus, it is not clear that the closing of the warehouse will be a net financial gain. Second, respondents claim that their projected sales for 1998 and beyond will enable them to pay antidumping expenses in the foreseeable future. We agree with petitioner that the evidence supporting respondent's projections of CIC's future financial health is insufficient for the Department to conclude that CIC will be able to pay, independently, its antidumping expenses with respect to the eleventh review entries. Because much of this information is proprietary, it is discussed more fully in the May 11,

1999, *Analysis Memorandum for the Final Results (Analysis Memorandum)*.

We disagree, however, with petitioner's argument that a higher standard of proof should be required in this case than in the *Dutch Steel* cases on the grounds that this case involved an actual reimbursement, whereas in those cases the triggering element was only an agreement to reimburse. Both cases involve a finding of reimbursement. The same consequences flow from those findings: a deduction from U.S. price and a presumption that, absent evidence to the contrary, duties assessed on future entries will also be reimbursed. We do not believe it is useful or appropriate to establish what could potentially be numerous different standards based on the nature of the reimbursement at issue.

We note, however, that, even when the same standard is applied, Hoogovens, the respondent in the *Dutch Steel* cases, provided much more convincing evidence that its importer would be financially able to pay future antidumping duties. For example, the Hoogovens case involved acquisition by the importing subsidiary of new profit centers and income streams. See *Certain Cold-rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review*, 64 FR 11825, 11832 (March 10, 1999) (Hoogovens has entered into a joint venture with a U.S. firm to build a galvanizing plant in Indiana; this was a major element of Hoogovens' restructuring, which also included the transfer to the U.S. importer of "the Rafferty-Brown companies"). This type of restructuring provides a much firmer basis for predicting stronger financial health than does the closing of a warehouse and vague expectations with respect to future sales trends.

Furthermore, the evidence respondents provide in support of their claim that they will be financially able to pay the eleventh review duties without assistance is intrinsically weak. Based on the foregoing analysis and that provided in our *Analysis Memorandum*, we find that respondents have failed to rebut the presumption in this case, and therefore determine that reimbursement within the meaning of 19 CFR 402(f) exists as to the eleventh POR entries. Therefore, in calculating the export price (or the constructed export price) in this review, the Department deducted the amount of the antidumping duty found to exist for Cinsa and ENASA in this review prior to calculating the final duties to be assessed.

We will continue to evaluate in future reviews whether CIC will have the financial capacity to meet

independently its antidumping duty obligations.

Comment 2: Enamel Frit Cost. Respondents Cinsa and ENASA disagree with the Department's finding in the preliminary results that affiliated supplier ESVIMEX's prices to Cinsa and ENASA did not reflect fair market prices. For the final results, respondents contend that the Department should use the enamel frit costs as reported. In the alternative, respondents assert that, if the Department continues to find that the reported enamel frit prices do not fully reflect fair market prices, the Department's preliminary results adjustment of reported enamel frit prices by a factor calculated to approximate fair market prices was fully consistent with the statute and should be used in the final results as well.

Respondents claim that, although the transfer prices for enamel frit charged by ESVIMEX to Cinsa and ENASA were less than prices charged to ESVIMEX's unaffiliated customers, the transfer prices represented fair market prices due to cost savings (in the areas of freight, insurance, commissions, packing, credit, bad debt and inventory costs) accruing to ESVIMEX on its sales to Cinsa and ENASA. In addition, Cinsa and ENASA asserted in their questionnaire response that any portion of the affiliated party discount not substantiated by cost savings and unaffiliated purchaser discounts, corresponded to a quantity discount, thereby making the affiliated party price equal to the fair market price.

According to respondents, the record provides substantial evidence that ESVIMEX's transfer prices for frit sold to Cinsa and ENASA were well above ESVIMEX's COP and similar to the prices for the same enamel frit types purchased from unaffiliated frit producers. In addition, respondents argue that, as in previous reviews, the Department improperly focused solely on the price difference between ESVIMEX's prices to Cinsa and ENASA, and ESVIMEX's prices to other unaffiliated customers. Respondents claim that the Department should have focused on the price paid by Cinsa for ESVIMEX's frit and the prices paid by Cinsa for the enamel frit of the unaffiliated producer. In addition, respondents assert that ESVIMEX's profit and loss statement for 1997 confirms that ESVIMEX was operating profitably during the POR, which would not be possible if it did not charge arm's length prices on a majority of its sales.

Finally, respondents contend that petitioner's alternate calculation is mathematically incorrect because the adjustment is based upon the percentage

of the documented cost savings as opposed to the percentage of undocumented costs savings necessary to increase transfer prices to approximate fair market value.

Petitioner also disagrees with the Department's finding in the preliminary results. Petitioner maintains that, because frit is a major input in the production of POS cookware, and because the record clearly reflects that the highest value for frit on the record is market value, the statute and the Department's practice require that enamel frit purchased from ESVIMEX be valued on the basis of market value. Accordingly, for purposes of the final results, petitioner argues that the Department should use the market price information on the record. In the alternative, petitioner states that if the Department adjusts rather than disregards the reported transfer prices, the methodology used in the tenth review is appropriate for that purpose.

Petitioner claims that the Court of International Trade held in *Cinsa, S.A. de C.V. v. United States*, 976 F. Supp. 1034, 1035 (1997) that the Department must consider alternative evidence only if there are no third-party prices available. In addition, petitioner contends that, by adjusting respondents' reported frit costs instead of disregarding such costs, the Department failed to follow the statute. Petitioner argues that the Department does not have the discretion to adjust below-market prices if actual market prices are available.

Furthermore, petitioner argues that it would be unreasonable and unsupported by the record for the Department to determine that a difference between prices reflects a discount when the existence of a discount has not been established. Petitioner claims that respondents concede that there was no such discount offered, but nevertheless argue that recognizing such a discount would not be "unreasonable." Petitioner contends that the Department correctly determined in the preliminary results, as well as in both the ninth and tenth reviews, that respondents failed to account for the entire difference between the affiliated and unaffiliated party frit prices.

Finally, petitioner argues that the Department cannot conclude that respondent's reported frit costs reflect market value based on Cinsa's purchases from an unaffiliated supplier, because the record is unclear as to exactly how much frit Cinsa actually purchased from an unaffiliated supplier during the POR. According to petitioner, Cinsa and ENASA have not even

alleged, let alone established, that the frit purchased from an unaffiliated supplier is comparable to the frit purchased from ESVIMEX.

DOC Position: As noted in the "Changes Since the Preliminary Results" section of this notice above, we have revised our preliminary frit calculation in order to increase more accurately the reported transfer price by the amount of the unverified discount. See *Calculation Memo for the Final Results* dated May 11, 1999 (*Calculation Memo*).

To ensure that enamel frit costs reflected fair market prices, we increased the reported costs of frit (based upon actual transfer prices) by a calculated factor to cover fully the differential in prices (inclusive of all documented cost savings) between sales to affiliated and unaffiliated parties. By increasing the reported affiliated party prices (i.e., transfer prices) by the percentage of the cost savings that was not verified, we accounted for the extent to which the verified cost savings failed to account for the difference between prices to affiliates and prices to unaffiliated parties.

We do not agree with Cinsa's and ENASA's argument that the Department must accept ESVIMEX's frit transfer prices as reported on the theory that the transfer price sales were made at a fair market value. Pursuant to section 773(f)(2) of the Act, a transaction between affiliated parties is considered an appropriate source of ascertaining the value of an input if it fairly represents the amount usually reflected in sales of subject merchandise in the relevant market. We have determined that the respondents adequately supported their claim during this review with respect to all cost efficiencies listed on the schedule. The Department has previously verified (e.g., in the context of the tenth review), that certain quantified differences between ESVIMEX's prices to affiliated parties and its prices to unaffiliated parties are accounted for by market-based factors, such as differences in transportation and packaging costs. However, these cost efficiencies did not account for the full extent of the discount afforded only to affiliated parties. Although Cinsa and ENASA claim that the unaccounted-for portion of the affiliated party discount should be attributed to a volume discount, they were unable to quantify and support how the volume of their purchases resulted in market-based savings equivalent to that unaccounted-for portion of the discount. Therefore, in accordance with the Department's longstanding policy of considering that transactions between affiliated parties

are not at arm's length in the absence of sufficient evidence to the contrary, the Department determined that this standard had not been met with respect to ESVIMEX's frit transfer prices to Cinsa and ENASA, and based its cost calculations instead upon the "adjusted transfer price," the computation of which is described in the *Calculation Memo*. Similarly, based on the information provided by Cinsa, we decline to find that the prices for Cinsa's purchases of enamel frit from an unaffiliated producer are an appropriate basis for determining whether their purchases from ESVIMEX reflect fair market prices. See *Calculation Memo* for further explanation. In addition, we disagree with respondents' contention that ESVIMEX's profit and loss statement for 1997 proves that it charges arm's-length prices on its sales of frit. Sales can produce some profit and still not be fully responsive to market conditions. Thus, we do not agree with the respondents that it is sufficient to show that ESVIMEX's frit prices to affiliates are above ESVIMEX's COP. The respondents' argument to this effect ignores the provisions of section 773(f)(2) of the Act, which also requires a comparison of transfer prices and market prices when the latter are available, and permits the use of the higher of those prices. Accordingly, we compared the transfer prices Cinsa and ENASA paid to prices charged to unaffiliated customers. We noted that the prices charged to unaffiliated customers were greater than both the affiliated transfer prices and the actual costs incurred to produce the frit supplied to Cinsa and ENASA. Because the prices charged to unaffiliated customers did not reflect certain market-based savings unique to ESVIMEX's affiliates, however, we constructed an "adjusted transfer price" which did reflect these elements. Because this price was higher than both ESVIMEX's COP and the transfer price, in conformity with section 773(f)(2) and (3) of the Act, we based Cinsa's and ENASA's frit cost on the "adjusted transfer price."

Comment 3: Inclusion of Costs Associated with the Acquisition of APSA in Cinsa's COP. Petitioner believes that the Department erred by failing to include any of the costs associated with the acquisition of fixed assets in Cinsa's COP. Petitioner argues that the Department's longstanding practice is to recognize gains or losses associated with the disposition of fixed assets as manufacturing costs, if the equipment was used in the production of the subject merchandise. See *Tapered*

Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China, 62 FR 6173, 6184 (February 11, 1997). Petitioner argues that, based on Cinsa's claim that it is currently using only a portion of the fixed assets purchased as part of the APSA acquisition, the Department should (1) determine that Cinsa incurred losses through the disposition of fixed assets purchased as part of the acquisition of APSA, (2) classify those losses as overhead costs, and (3) allocate the overhead costs to production of the subject merchandise during the POR. In the alternative, petitioner suggests that the Department should, at a minimum, include in Cinsa's COP the cost of depreciation with respect to both the machinery in use and the machinery in storage.

Respondents argue that the Department properly did not include the costs associated with the acquisition of fixed assets in Cinsa's COP. Cinsa argues that there is no record evidence to indicate that these fixed assets will be "written off," as claimed by petitioner. Furthermore, according to respondents, the Department's practice is to consider disposition of fixed assets as part of G&A expense and not as overhead expense.

DOC Position: We agree with both petitioner and respondents, in part. We agree with respondents that there is no record evidence to indicate that the fixed assets in question will be "written off." Cinsa reported that the remaining fixed assets "are stored for later use or sale." In fact, contrary to petitioner's argument, it is possible that if these fixed assets are sold, they could result in a gain, rather than a loss. Therefore, we have not determined that Cinsa incurred losses with respect to the disposition of fixed assets purchased as part of the acquisition of APSA. With regard to petitioner's argument that the cost of depreciation of the fixed assets purchased from APSA should be included in Cinsa's costs, we agree with petitioner in principle. However, based on our review of Cinsa's financial statements on the record, we cannot conclude that depreciation of the APSA assets has not already been accounted for in the depreciation costs reported by Cinsa. Accordingly, we have made no adjustment for the cost of depreciation of fixed assets.

Comment 4: Reclassification of All U.S. Sales as Constructed Export Price (CEP) Sales. Petitioner argues that respondents have failed to establish that the role of their U.S. affiliate, CIC, was merely ancillary with respect to the sales classified as EP. Specifically, petitioner claims that, despite the

Department's direct request for documentation supporting the classification of EP sales (such as telephone logs or bills showing that Cinsa's export department communicated by telephone directly with U.S. customers), respondents failed to provide any evidence that Cinsa's export department, and not CIC, made the sales reported as EP sales. Therefore, for purposes of the final results, petitioner argues that the Department should reclassify the reported EP sales as CEP sales.

In the alternative, petitioner argues that the Department should correct the understatement of "CEP only" indirect selling expenses. Petitioner claims that, in addition to the expenses already determined by the Department to be "CEP only," the Department should also include the following expense categories: warehouse expenses (using as a "reasonable proxy" the annual expenses reported in the February 1, 1999, reimbursement submission); salesmen's salary expenses; professional fee expenses; travel expenses; and United Parcel Service (UPS) expenses. Respondents argue that the Department's classification of U.S. sales in the preliminary results is consistent with its determinations in all prior administrative reviews, including the final results of the ninth and tenth administrative reviews. Respondents argue that, in response to a Department request, they did in fact provide information on CIC's involvement in the sales process, stating on the record, for example, that "for EP transactions the transfer price from Cinsa to CIC and the sales price to the unaffiliated U.S. customers are established by Cinsa's export sales department."

With respect to the calculation of CIC's indirect selling expenses, respondents concede that warehousing expenses could be classified as "CEP only" expenses, but they argue that salaries and wages, professional fee expenses, travel expenses and UPS (package delivery) expenses are administrative expenses rather than selling expenses. Therefore, respondents submit that the Department's preliminary results correctly calculated the CEP-exclusive expenses and allocated the remaining joint CEP/EP expenses among EP and CEP sales. Finally, according to respondents, because warehouse rental expenses were included within total rental expenses (which are part of the reported indirect selling expenses), it is not necessary to revise the calculation. However, if the Department decides to refine this calculation, respondents provide for this purpose a revised CIC

indirect selling expenses calculation as part of their rebuttal brief.

DOC Position: We agree with the respondents that the facts on the record of this review show that the sales reported as EP sales should continue to be classified as EP sales. Pursuant to section 772(a) and (b) of the Act, an EP sale is a sale of merchandise by a producer or exporter outside the United States for export to the United States that is made prior to importation. A CEP sale is a sale made in the United States, before or after importation, by or for the account of the producer or exporter or by an affiliate of the producer or exporter. In determining whether sales involving a U.S. subsidiary should be characterized as EP sales, the Department has examined the following criteria: (1) whether the merchandise was shipped directly from the manufacturer to the unaffiliated U.S. customer, (2) whether this was the customary commercial channel between the parties involved, and (3) whether the function of the U.S. affiliate is limited to that of a "processor of sales-related documentation" and a "communication link" with the unrelated U.S. buyer. See, e.g., *Final Results of Antidumping Duty Administrative Review: Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada (Canadian Steel)* 63 FR 12725, 12738 (March 16, 1998). In the Canadian Steel case, the Department clarified its interpretation of the third prong of this test, as follows. "Where the factors indicate that the activities of the U.S. affiliate are ancillary to the sale (e.g., arranging transportation or customs clearance, invoicing), we treat the transactions as EP sales. Where the U.S. affiliate has more than an incidental involvement in making sales (e.g., solicits sales, negotiates contracts or prices, or provides customer support), we treat the transactions as CEP sales."

With respect to the first prong of the test, it is undisputed that the merchandise associated with the sales at issue was shipped directly to the unaffiliated customer without passing through the U.S. affiliate.

With respect to the second prong of the test, this is the customary commercial channel between the parties involved. We note that it is not necessary for EP sales to be the predominant channel of trade in a given review for it to be the customary channel between the parties involved. EP sales have been made with the participation of a U.S. affiliate in the investigation and in all subsequent reviews. Thus, this is clearly a customary channel of trade.

With respect to the third prong of the test, the Department verified in the tenth administrative review (the most recent verification of this order) that, for the sales classified as EP, prices are set by the Cinsa export office in Saltillo, Mexico. The record of this eleventh review demonstrates that participation of affiliate CIC in these sales relates primarily to: issuing payment invoices, accepting payment and forwarding it to Mexico, posting antidumping duty deposits, and clearing products through U.S. Customs. These services are clearly among those the Department considers as being "ancillary" to the sale. CIC does not solicit or negotiate these sales, does not set the price for these sales, and does not provide customer support in connection with these sales.

With regard to petitioner's argument that respondents did not completely respond to the Department's request for evidence supporting the classification of certain U.S. sales as EP, Cinsa and ENASA provided, as part of their June 15, 1998, submission, a phone bill listing calls to Laredo, Texas, where the majority of calls from Mexico are connected to the U.S. telephone network, as well as a listing of calls to various U.S. locations.

Therefore, for the purposes of this review, we will continue to treat as EP those sales which Cinsa and ENASA reported as EP sales.

With regard to petitioner's argument that the Department should correct the alleged understatement of "CEP only" indirect selling expenses, we agree in part and have included an amount for warehouse expenses in "CEP only" expenses. For this purpose, we used the annual warehouse expenses reported in the February 1, 1999, reimbursement submission, as a reasonable proxy. However, we agree with respondents that salaries and wages, professional fee expenses, travel expenses and UPS expenses are not related exclusively to CEP sales. For example, salaries and wages may also be paid to CIC personnel responsible for accounting, logistics, and administration. There is no evidence on the record indicating that these salaries and wages are paid only to salesmen involved with CEP sales. Similarly, professional fee expenses, travel expenses and UPS expenses relate to all CIC sales, not just CEP sales. Therefore we have continued to allocate these expenses among EP and CEP sales.

Comment 5: CIC Packing Expenses. Petitioner argues that the Department should deduct packing expenses incurred in the United States by CIC as a direct selling expense. Petitioner claims that respondents originally stated

in their April 9, 1998, response that no repacking occurred in the United States. However, according to petitioner, an amount for packing expenses incurred by CIC in the United States was reported in the November 25, 1998, response. Because it is unclear which sales (EP or CEP) were repacked by CIC, petitioner asserts that these repacking expenses should be allocated between EP and CEP sales, and deducted from the starting prices of all U.S. sales.

DOC Position: We agree, in part, with petitioner and have deducted these repacking expenses incurred in the United States by CIC as a direct selling expense. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom: Final Results of Antidumping Duty Administrative Review*, 63 FR 33338 (June 18, 1998). However, we have allocated the repacking expenses over CEP sales only because the vast majority of sales on which repacking is incurred at CIC are CEP sales. None of the sales classified as EP sales pass through CIC's warehouse en route to the customer for breakdown into smaller lots. Although it is possible that some EP sales may be repacked at CIC if they are being returned to Mexico, this would be the exception because EP sales do not normally physically pass through CIC. Accordingly, we have allocated these expenses over CEP sales only. See *Calculation Memo*.

Comment 6: U.S. Inland Freight Expenses. Petitioner contends that, for purposes of the final results, the Department should reject respondents' calculation of U.S. inland freight expenses, and assign an amount based on the facts otherwise available. Petitioner argues that respondents' three attempts to explain their reported U.S. inland freight expenses are contradictory and not credible. As the facts otherwise available, petitioner advocates the use of the highest per-unit amount reported on Cinsa's and ENASA's U.S. sales tape for each CEP sales observation.

Respondents argue that, because they reported their U.S. inland freight expense using the same methodology that was reviewed and accepted by the Department in prior administrative reviews, there is no basis to resort to the use of facts available. Cinsa and ENASA argue that they do not record inland freight expenses in a manner that would permit reporting any other way. Accordingly, respondents argue that the Department should continue to use the preliminary results methodology for purposes of the final results.

DOC Position: We disagree with petitioner's claim that respondents' inland freight expenses are contradictory and not credible. Cinsa and ENASA calculated their U.S. inland freight expense by dividing the total freight cost incurred by CIC by the total weight of all products shipped by CIC. Because all products shipped by CIC were charged freight expense on the basis of the weight shipped, Cinsa's and ENASA's allocation methodology fairly reported the incurred freight cost for light and heavy gauge products during the POR. Moreover, Cinsa and ENASA used the same reporting methodology in the instant review as in prior reviews, and we have previously found this methodology acceptable in light of the respondents' inability to report the expenses at issue on a shipment-specific basis. See, *Porcelain-on-Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review*, 63 FR 38373 (July 16, 1998) (*POS Cookware Tenth Review Final*). See also *Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 61 FR 1328, 1333 (January 19, 1996). Accordingly, we have accepted respondents' methodology for U.S. inland freight expenses.

Comment 7: Indirect Selling Expenses Incurred in Mexico. Petitioner argues that the failure by the Department to deduct indirect selling expenses incurred in Mexico in calculating CEP is contrary to both the plain language of the statute and the congressional intent as set forth in the legislative history. Petitioner believes that, by specifically using the word "any" in section 772(d)(1)(D) of the Act, Congress expressly required the Department to deduct from the CEP starting price all expenses incurred by the exporter that are reasonably attributable to CEP sales, regardless of where the expenses were incurred, or whether the expenses related to the sale to the affiliated U.S. importer or the sale to the first unaffiliated customer in the United States. Petitioner cites to cases interpreting the Fair Labor Standards Act and the Americans with Disabilities Act and Rehabilitation Act of 1973 in support of its position. In addition, the petitioner asserts that nothing in the House or Senate reports discussing the URAA amendments to section 772(d) indicates any intent to limit the deduction of indirect selling expenses to expenses incurred in the United States or to expenses relating to sales by affiliated importers to unaffiliated purchasers. Furthermore, according to

petitioner, the legislative history confirms that Congress specifically intended no change in the types of expenses that the Department deducted from exporter's sale price under the prior law, including indirect selling expenses related to U.S. sales but incurred in the exporting country. Accordingly, for purposes of the final results, petitioner claims that the Department should recalculate the dumping margin after deducting indirect selling expenses and inventory carrying costs incurred in Mexico in the calculation of CEP.

Respondents argue that the Department's own regulations explicitly state that "[t]he Secretary will not make an adjustment for any [additional CEP] expense that is related solely to the sale to an affiliated importer in the United States." Respondents further contend that petitioner's argument that the Department should deduct all expenses incurred by the exporter, regardless of whether they can reasonably be attributed to "economic activities occurring in the United States" in calculating CEP is based on an incorrect reading of section 772(d)(1) of the Act and ignores the rest of the provision. Respondents contend that petitioner gives undue emphasis to the word "any" and cites judicial precedents involving statutory interpretations of unrelated statutes. Finally, Cinsa and ENASA note that petitioner raised this precise issue in the context of the ninth and tenth administrative reviews of this proceeding and the Department rejected petitioner's argument in both instances.

DOC Position: With regard to indirect selling expenses incurred in Mexico in support of sales to the United States, we agree with the respondents that such expenses do not relate to economic activity in the United States. The Department's current practice, as indicated by the preamble to the Department's new regulations, is to deduct indirect selling expenses incurred in the home market from the CEP calculation only if they relate to sales to the unaffiliated purchaser in the United States. We do not deduct from the CEP calculation indirect selling expenses incurred in the home market relating to the sale to the affiliated purchaser.

Although the statute does not expressly state whether or not its terms apply to indirect selling expenses associated both with sales to the U.S. affiliates and with the subsequent sales by the U.S. affiliates, the overall statutory scheme and the legislative history of the URAA, including the Statement of Administrative Action (SAA), guide the interpretation of this

provision as applying only to the sale in the United States.

After the URAA was implemented, the Department no longer deducted selling expenses associated with the foreign producer's sale to the affiliate from the U.S. price and the home market price when it calculated the margin based on CEP. The SAA describes how the Department is to treat these expenses under the post-URAA statute. The SAA clearly states that, in calculating the CEP, the Department would now deduct from the starting price only expenses "associated with economic activities occurring in the United States." See SAA at 823. The remedy sought by petitioner would eliminate the equilibrium embodied in the post-URAA statute by reducing the U.S. price without a comparable reduction to the home market price. See *Antidumping Duties: Countervailing Duties: Final Rule*, 62 FR 27296, 27351-27352 (preamble to 19 CFR § 351.402). See also *POS Cookware Tenth Review Final* at 38381. Accordingly, because Cinsa and ENASA reported that certain indirect selling expenses incurred in Mexico are not associated with selling activity occurring in the United States, but are limited to selling activities associated with the sale of merchandise in Mexico to the affiliated party, CIC, we have not deducted these Mexican indirect selling expenses from the CEP calculation.

Comment 8: Calculation of CEP Profit. Petitioner argues that because the Department erred in its calculation of CEP by failing to deduct all selling expenses as required by the statute, the Department also failed to include all selling expenses in "total United States expenses" and, therefore, incorrectly calculated CEP profit. Petitioner contends that the statute explicitly requires the Department to include in "total United States expenses" all expenses referred to in subsections (d)(1) and (2) of section 772.

Petitioner further argues that the Department improperly included movement expenses in "total expenses" for purposes of the CEP profit calculation, citing *U.S. Steel Group v. United States*, 15 F. Supp.2d 892 (CIT 1998) (*U.S. Steel Group*). According to petitioner, in *U.S. Steel Group* the Court found that the limitation of "total expenses" to expenses relating to "production and sale" of the merchandise was intended to include the same types of expenses that are included in the calculation of total U.S. expenses, all of which relate either to production or sale of the merchandise, excluding movement expenses.

Accordingly, petitioner contends that the Department should include indirect selling expenses and inventory carrying costs incurred in Mexico and exclude movement expenses in determining "total U. S. expenses" for purposes of the CEP profit calculation.

Respondents argue that, because the indirect selling expenses incurred in Mexico that are "associated with economic activities in the United States" do not include those expenses incurred by Cinsa and ENASA in making the sale to CIC, these expenses are also properly omitted from the CEP profit calculation. Respondents assert that, in calculating the amount of profit to deduct from the starting price in the CEP calculation, the Department properly focused on the amount of profit associated with the CEP sales made by CIC to its unaffiliated U.S. customers.

With regard to movement expenses, respondents contend that inclusion of these expenses in "total expenses" for purposes of calculating CEP profit is consistent with the Department's prior practice and with the policy bulletin entitled "Calculation of Profit for Constructed Export Price Transactions." Moreover, respondents argue that, contrary to petitioner's assertions, the CEP profit provision of the statute is ambiguous as to whether movement expenses should be included in "total expenses." Therefore, according to respondents, it is well within the Department's discretion to interpret section 772 of the Act to include movement expenses as part of "total expenses."

DOC Position: We agree with respondents. In calculating the amount of profit to deduct from the starting price in performing the CEP calculation, we properly deducted the amount of profit allocated to the CEP sales made by CIC to its unaffiliated U.S. customers. Since the purpose of the CEP adjustments is to construct the arm's length equivalent of a sale from the exporter to the U.S. affiliate by subtracting expenses associated with the downstream sale by the affiliate to the first unaffiliated customer and profit allocated to those expenses, there is no reason to include in this calculation expenses associated with the upstream sale by Cinsa's export office.

As explained in Comment 7, above, the indirect selling expenses referred to in section 772(d)(1)(D) of the Act do not include those expenses incurred by the foreign producer in making the sale to the U.S. affiliate. Moreover, the SAA clarifies that, whether incurred by the foreign producer or the U.S. affiliate, the selling expenses to be used in the CEP

profit calculation are those associated with the sale made in the United States. Accordingly, the Mexican indirect selling expenses at issue are properly excluded from the CEP profit calculation.

With regard to movement expenses, such expenses are included in "total expenses" pursuant to the Department's policy as embodied in Policy Bulletin 97.1 "Calculation of Profit for Constructed Export Price Transactions." This policy, in recognizing that total profits are based upon expenses that include movement expenses, comes the closest to meeting the statutory purpose of the CEP profit calculation.

With regard to U.S. Steel Group, cited by petitioner, we disagree with the Court's holding with respect to this issue, and are seeking appeal. Congress has expressly clarified in the SAA, at 824, that section 772(d)(3) refers to profit allocable to "selling, distribution, and further manufacturing" activities in connection with the affiliate's U.S. sale. Excluding movement from "total expenses" would incorrectly discount the proportionality that must logically exist between the "total expenses" calculated and the profits attributable to those expenses, when those profits are based on expenses that include movement. Moreover, such an exclusion fails to achieve the statutory purpose of removing the profits associated with all aspects of the affiliate's sale in the United States. Accordingly, for purposes of the final results, we have included movement expenses in "total expenses" for the CEP profit calculation.

Comment 9: Ministerial Error in the Concordance Section of the Margin Program. Respondents claim that the preliminary margin programs cause the concordance to "loop to end" before matching to all sales. The respondents contend that this programming error results in a number of products matching to constructed value (CV) instead of to their proper sales price matches. Accordingly, respondents argue that the Department should correct the current product concordance sections in the margin programs and have provided suggested programming language to achieve this result.

DOC Position: We disagree with respondents. After an analysis and testing of the computer programs, we have determined that the use of respondents' suggested programming language does not yield a different result with regard to product matches. Both the Department's and respondents' programming language are equally valid for this step of programming. The number of products matching to CV (or to sales price matches) does not change

between the two programs. Accordingly, we have not revised the concordance portions of the margin programs as suggested by respondents.

Final Results of Review

As a result of this review, we have determined that the following margins exist for the period December 1, 1996 through November 30, 1997:

Manufacturer/Exporter	Margin (percent)
Cinsa	25.34
ENASA	65.23

The Department shall determine, and the U.S. Customs Service shall assess, antidumping duties on all appropriate entries. We have calculated an importer-specific assessment rate based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those same sales. This rate will be assessed uniformly on all entries of that particular importer made during the POR. The Department will issue appraisal instructions directly to the Customs Service.

Further, the following deposit requirements shall be effective for all shipments of the subject merchandise from Mexico that are entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided for by section 751(a)(1) of the Act: (1) the cash deposit rates for Cinsa and ENASA will be the rates established above in the "Final Results of Review" section; (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters of this merchandise will continue to be 29.52 percent, the all others rate established in the final determination of the less-than-fair-value investigation (51 FR 36435, October 10, 1986).

The deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a final reminder to importers of their responsibility under 19 CFR § 351.402(f) to file a certificate regarding the reimbursement

of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR § 353.34(d). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulation and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR § 351.221.

Dated: May 11, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99-12504 Filed 5-17-99; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Visiting Committee on Advanced Technology

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of partially closed meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that the Visiting Committee on Advanced Technology, National Institute of Standards and Technology (NIST), will meet Tuesday, June 8, 1999 from 8:30 a.m. to 5:00 p.m. The Visiting Committee on Advanced Technology is composed of fifteen members appointed by the Director of NIST; who are eminent in such fields as business, research, new product development, engineering, labor, education, management consulting, environment, and international relations. The purpose of this meeting is to review and make recommendations regarding general policy for the Institute, its organization, its budget, and its programs within the framework of applicable national

policies as set forth by the President and the Congress. The agenda will include an update on NIST programs; NRC Assessment Panels discussion; Physics Laboratory's The Atom Laser; Information Technology Laboratory's Active Networks; Manufacturing Engineering Laboratory's Meso/Micro/Nano Technology; and a lab tour. Discussions scheduled to begin at 8:30 a.m. and to end at 9:10 a.m. on June 8, 1999, on staffing of management positions at NIST and the NIST budget, including funding levels of the Advanced Technology Program and the Manufacturing Extension Partnership will be closed.

DATES: The meeting will convene June 8, 1999, at 8:30 a.m. and will adjourn at 5:00 p.m. on June 8, 1999.

ADDRESSES: The meeting will be held in the Employees' Lounge (seating capacity 80, includes 38 participants), Administration Building, at NIST, Gaithersburg, Maryland.

FOR FURTHER INFORMATION CONTACT: Dr. Brian C. Belanger, Executive Director, Visiting Committee on Advanced Technology, National Institute of Standards and Technology, Gaithersburg, MD 20899-1004, telephone number (301) 975-4720.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on August 7, 1998, that portions of the meeting of the Visiting Committee on Advanced Technology which involve discussion of proposed funding of the Advanced Technology Program and the Manufacturing Extension Partnership Program may be closed in accordance with 5 U.S.C. 552b(c)(9)(B), because those portions of the meetings will divulge matters the premature disclosure of which would be likely to significantly frustrate implementation of proposed agency actions; and that portions of meetings which involve discussion of the staffing issues of management and other positions at NIST may be closed in accordance with 5 U.S.C. 552b(c)(6), because divulging information discussed in those portions of the meetings is likely to reveal information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Dated: May 10, 1999.

Karen H. Brown,

Deputy Director.

[FR Doc. 99-12510 Filed 5-17-99; 8:45 am]

BILLING CODE 3510-13-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Establishment of an Export Visa Arrangement for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Fiji

May 11, 1999.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing export visa requirements.

EFFECTIVE DATE: June 1, 1999.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

Pursuant to exchange of notes dated March 3, 1999 and April 26, 1999, the Governments of the United States and the Republic of the Fiji Islands agreed to establish an Export Visa Arrangement for cotton and man-made fiber textile products subject to import control. That is, products in merged-Categories 338/339/638/639 will be visaed as either part-Categories 338-S/339-S/638-S/639-S or part-Categories 338-O/339-O/638-O/639-O, produced or manufactured in Fiji and exported from Fiji on and after June 1, 1999. Products exported during the period June 1, 1999 through June 30, 1999 shall not be denied entry for lack of a visa. All products exported on and after July 1, 1999 must be accompanied by an appropriate export visa.

A description of the textile and apparel categories in terms of HTS numbers is available in the **CORRELATION:** Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 63 FR 71096, published on December 23, 1998).

Interested persons are advised to take all necessary steps to ensure that textile products that are entered into the United States for consumption, or withdrawn from warehouse for consumption, will meet the visa requirements set forth in the letter

published below to the Commissioner of Customs.

Troy H. Cribb,
Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

May 11, 1999.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854) and Executive Order 11651 of March 3, 1972, as amended; the Uruguay Round Agreement on Textiles and Clothing (ATC) and the Export Visa Arrangement, effected by exchange of notes dated March 3, 1999 and April 26, 1999 between the Governments of the United States and the Republic of the Fiji Islands, you are directed to prohibit, effective on June 1, 1999, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton and man-made fiber textile products in part-Categories 338-S/339-S/638-S/639-S and part-Categories 338-O/339-O/638-O/639-O, produced or manufactured in Fiji and exported from Fiji on and after June 1, 1999 for which the Government of the Republic of the Fiji Islands has not issued an appropriate export visa fully described below. Should whole categories, merged categories or part categories become subject to import quota, the whole, merged or part category(s) automatically shall be included in the coverage of this arrangement. Merchandise in the whole, merged or part category(s) exported on or after the date the whole, merged or part category(s) is added to the agreement or becomes subject to import quotas shall require a visa. Products exported during the period June 1, 1999 through June 30, 1999 shall not be denied entry for lack of an export visa. All products exported on and after July 1, 1999 must be accompanied by an appropriate export visa.

A visa must accompany each commercial shipment of the aforementioned textile products. A circular stamped marking in blue ink will appear on the front of the original commercial invoice or successor document. The original visa shall not be stamped on duplicate copies of the invoice. The original invoice with the original visa stamp will be required for the shipment to enter into the United States. Duplicates of the invoice and/or visa may not be used for this purpose.

Each visa stamp shall include the following information:

1. The visa number. The visa number shall be in the standard nine digit letter format, beginning with one numeric digit for the last digit of the year of export, followed by the two character alpha country code specified by the International Organization for Standardization (ISO) (the code for the Fiji is "FJ"), and a six digit numerical serial number identifying the shipment; e.g., 9FJ123456.
2. The date of issuance. The date of issuance shall be the day, month and year on which the visa was issued.
3. The original signature of the issuing official authorized by the Fiji Islands

Customs Service for the Government of the Republic of the Fiji Islands.

4. The correct category(s), merged category(s), part category(s), quantity(s) and unit(s) of quantity of the shipment as set forth in the U.S. Department of Commerce Correlation and in the Harmonized Tariff Schedule of the United States shall be reported in the spaces provided within the visa stamp (e.g., "Cat. 338-S/339-S/638-S/639-S—510 DOZ").

Quantities must be stated in whole numbers. Decimals or fractions will not be accepted. Merged category quota merchandise may be accompanied by either the appropriate merged category visa or the correct category visa corresponding to the actual shipment. For example, quota Category 338-O/339-O/638-O/639-O may be visaed as Category 338-O/339-O/638-O/639-O or if the shipment consists solely of Category 338-O merchandise, the shipment may be visaed as "Category 338-O" but not as "Category 339-O." If, however, a merged quota category such as Category 338/339/638/639 has a quota sublimit on Category 338-S/339-S/638-S/639-S, then there must be a "Category 338-S/339-S/638-S/639-S" visa for the shipment if it includes Category 338-S/339-S/638-S/639-S merchandise.

U.S. Customs shall not permit entry if the shipment does not have a visa, or if the visa number, date of issuance, signature, category, quantity or units of quantity are missing, incorrect or illegible, or have been crossed out or altered in any way. If the quantity indicated on the visa is less than that of the shipment, entry shall not be permitted. If the quantity indicated on the visa is more than that of the shipment, entry shall be permitted and only the amount entered shall be charged to any applicable quota.

The complete name and address of a company actually involved in the manufacturing process of the textile product covered by the visa shall be provided on the textile visa document.

If the visa is not acceptable then a new correct visa or a visa waiver must be presented to the U.S. Customs Service before any portion of the shipment will be released. A visa waiver may be issued by the U.S. Department of Commerce at the request of the country office in Washington, DC, for the Government of the Republic of the Fiji Islands. The waiver, if used, only waives the requirement to present a visa with the shipment. It does not waive the quota requirements. Visa waivers will only be issued for classification purposes or for one-time special purpose shipments that are not part of an ongoing commercial enterprise.

If the visaed invoice is deficient, the U.S. Customs Service will not return the original document after entry, but will provide a certified copy of that visaed invoice for use in obtaining a new correct original visaed invoice, or a visa waiver.

If import quotas are in force, U.S. Customs Service shall charge only the actual quantity in the shipment to the correct category limit. If a shipment from Fiji has been allowed entry into the commerce of the United States with either an incorrect visa or no visa, and redelivery is requested but cannot be made, the shipment will be charged to the correct

category limit whether or not a replacement visa or waiver is provided.

Merchandise imported for the personal use of the importer and not for resale, regardless of value, and properly marked commercial sample shipments valued at U.S. \$800 or less

do not require an export visa for entry and shall not be charged to existing quota levels.

A facsimile of the visa stamp is enclosed. The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5

U.S.C. 553(a)(1). This letter will be published in the **Federal Register**.

Sincerely,
Troy H. Cribb,
Chairman, Committee for the Implementation of Textile Agreements.

BILLING CODE 3510-DR-F



Export Visa Stamp for the Republic of Fiji

[FR Doc. 99-12509 Filed 5-17-99; 8:45 am]
BILLING CODE 3510-DR-C

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of a Limit and a Sublimit for Certain Cotton Textile Products Produced or Manufactured in Singapore

May 11, 1999.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs reducing a limit and a sublimit.

EFFECTIVE DATE: May 18, 1999.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927-5850, or refer to the U.S. Customs website at <http://www.customs.ustreas.gov>. For information on embargoes and quota re-openings, call (202) 482-3715.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limit for Categories 338/339 and the current sublimit for Category 339 are being reduced for carryforward used in 1998.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 63 FR 71096, published on December 23, 1998). Also see 63 FR 69056, published on December 15, 1998.

Troy H. Cribb,
Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements
May 11, 1999.
Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on December 8, 1998, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textile products, produced or

manufactured in Singapore and exported during the twelve-month period which began on January 1, 1999 and extends through December 31, 1999.

Effective on May 18, 1999, you are directed to reduce the limit and the sublimit for the following categories, as provided for under the Uruguay Round Agreement on Textiles and Clothing:

Category	Adjusted twelve-month limit ¹
338/339	1,405,077 dozen of which not more than 868,897 dozen shall be in Category 338 and not more than 928,061 dozen shall be in Category 339.

¹ The limits have not been adjusted to account for any imports exported after December 31, 1998.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,
Troy H. Cribb,
Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.99-12508 Filed 5-17-99; 8:45 am]

BILLING CODE 3510-DR-F

DEPARTMENT OF DEFENSE**Office of the Secretary****Submission for OMB Review;
Comment Request****ACTION:** Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Form Number, and OMB Number: Offered Candidate Procedures, USMA Forms 534, 5-499, 5-490, 2-66, 847, 5-489, 5-519, 8-2, 6-154, 5-515, 5-516; OMB Number 0702-0062.

Type of Request: Reinstatement.

Number of Respondents: 13,200.

Responses Per Respondent: 1.

Annual Responses: 13,200.

Average Burden Per Response: 5 minutes.

Annual Burden Hours: 1,100.

Needs and Uses: United States Military Academy candidates provide personal background information which allows the Admissions Committee to make subjective judgment on non-academic experiences. Data are also used by the Office of Institutional Research for correlation with success in graduation and military careers. The Admissions Office and other organizations require information on candidates who receive an offer of admission to enable them to order supplies, clothes, eye glasses, and prepare travel arrangements for the incoming class.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent obligation: Required to obtain or retain benefits.

OMB Desk Officer: Mr. Edward D. Springer; written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Offer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing; written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302.

Dated: May 12, 1999.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 99-12388 Filed 5-17-99; 8:45 am]

BILLING CODE 5001-10-M

DEPARTMENT OF DEFENSE**Defense Contract Audit Agency****Privacy Act of 1974; Systems of Records**

AGENCY: Defense Contract Audit Agency, DoD.

ACTION: Notice to amend and delete records systems.

SUMMARY: The Defense Contract Audit Agency is amending and deleting systems of records notices in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The actions will be effective on June 17, 1999, unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to Defense Contract Audit Agency, Information and Privacy Advisor, CMR, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

FOR FURTHER INFORMATION CONTACT: Mr. Dave Henshall at (703) 767-1005.

SUPPLEMENTARY INFORMATION: The Defense Contract Audit Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed actions are not within the purview of subsection (r) of the Privacy Act (5 U.S.C. 552a), as amended, which would require the submission of a new or altered system report for each system. The specific changes to the record systems being amended are set forth below followed by the notices, as amended, published in their entirety.

Dated: May 7, 1999.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

**DELETIONS
RDCAA 152.5****SYSTEM NAME:**

Notification of Security Determinations (*November 20, 1997, 62 FR 62003*).

Reason: Records have been consolidated and are now maintained under RDCAA 152.2, RDCAA 152.3, and RDCAA 152.4.

RDCAA 152.6**SYSTEM NAME:**

Regional and DCAI Security Clearance Request Files (*November 20, 1997, 62 FR 62003*).

Reason: Records have been consolidated and are now maintained under RDCAA 152.2, RDCAA 152.3, and RDCAA 152.4.

RDCAA 371.5**SYSTEM NAME:**

Locator Records (*November 20, 1997, 62 FR 62003*).

Reason: Records are no longer used or maintained. Therefore, records have been destroyed.

RDCAA 440.2**SYSTEM NAME:**

Time and Attendance Reports (*November 20, 1997, 62 FR 62003*).

Reason: Records are no longer retrieved by personal identifier.

RDCAA 590.9**SYSTEM NAME:**

DCAA Automated Personnel Inventory System (APIS) (*November 20, 1997, 62 FR 62003*).

Reason: System no longer exists. All records were destroyed.

**AMENDMENTS
RDCAA 152.1****SYSTEM NAME:**

Security Information System (SIS) (*November 20, 1997, 62 FR 62003*).

CHANGES

* * * * *

SYSTEM LOCATION:

Delete second paragraph.

* * * * *

RETENTION AND DISPOSAL:

Change "two years" to "five years".

* * * * *

NOTIFICATION PROCEDURE:

Delete second paragraph and replace with "Individuals must furnish name, Social Security Number, and approximate date of their association with DCAA."

RECORD ACCESS PROCEDURES:

Delete second paragraph and replace with "Individuals must furnish name, Social Security Number, and approximate date of their association with DCAA."

* * * * *

RECORD SOURCE CATEGORIES:

Delete entry and replace with "Information, other than data obtained directly from individual employees, is obtained by DCAA Headquarters Security and Regional Office Personnel Divisions, and Federal Agencies."

* * * * *

RDCAA 152.1**SYSTEM NAME:**

Security Information System (SIS).

SYSTEM LOCATION:

Security Office, Headquarters,
Defense Contract Audit Agency, 8725
John J. Kingman Road, Suite 2135, Fort
Belvoir, VA 22060-6219.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All DCAA employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records contain name, Social Security Number, date and place of birth, citizenship, position sensitivity, accession date, type and number of DCAA identification, position number, organizational assignment, security adjudication, clearance, eligibility, and investigation data.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; E.O. 10450, Security Requirements for Government Employees, as amended; E.O. 12958, Classified National Security Information; and E.O. 9397 (SSN).

PURPOSE(S):

To provide the DCAA Security Office with a ready reference of security information on DCAA personnel.

To submit data on a regular basis to the Defense Clearance and Investigations Index (DCII).

To provide the DCAA Drug Program Coordinator with a listing of individuals who hold security clearances for the purpose of creating the drug testing pool, from which individuals are randomly chosen for drug testing.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'Blanket Routine Uses' that appear at the beginning of DCAA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**STORAGE:**

Records are maintained in automated data systems.

RETRIEVABILITY:

Records are retrieved by Social Security Number or name of employee.

SAFEGUARDS:

Automated records are protected by restricted access procedures. Records are accessible only to authorized personnel who are properly cleared and trained and who require access in connection with their official duties.

RETENTION AND DISPOSAL:

Records are retained in the active file until an employee separates from the agency. At that time, records are moved to the inactive file, retained for five years, and then deleted from the system. Hard copy listings and tapes produced by this system are destroyed by burning.

SYSTEM MANAGER(S) AND ADDRESS:

Security Officer, Headquarters,
Defense Contract Audit Agency, 8725
John J. Kingman Road, Suite 2135, Fort
Belvoir, VA 22060-6219.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Security Office, Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

Individuals must furnish name, Social Security Number, and approximate date of their association with DCAA.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Security Office, Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

Individuals must furnish name, Social Security Number, and approximate date of their association with DCAA.

CONTESTING RECORD PROCEDURES:

DCAA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DCAA Regulation 5410.10; 32 CFR part 317; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information, other than data obtained directly from individual employees, is obtained by DCAA Headquarters Security and Regional Office Personnel Divisions, and Federal Agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

RDCAA 152.2**SYSTEM NAME:**

Personnel Security Data Files
(November 20, 1997, 62 FR 62003).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete second paragraph.

* * * * *

RECORD ACCESS PROCEDURES:

Delete third paragraph and replace with 'Acceptable identification, that is, driver's license or employing offices' identification card. Visits are limited to those office (Headquarters Security Office) listed in the official mailing addresses published as an appendix to DCAA's compilation of record system notices.

* * * * *

RDCAA 152.2**SYSTEM NAME:**

Personnel Security Data Files.

SYSTEM LOCATION:

Headquarters, Defense Contract Audit Agency, 725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All applicants for employment with Defense Contract Audit Agency (DCAA); all DCAA employees; all persons hired on a contractual basis by, or serving in an advisory capacity to DCAA.

CATEGORIES OF RECORDS IN THE SYSTEM:

Section One (152.2) contains copies of individual's employment applications, requests for, and approval or disapproval of, emergency appointment authority; requests for security clearance; interim and final security clearance certificates.

Section Two (152.3) contains security investigative questionnaires and verification of investigations conducted to determine suitability, eligibility or qualifications for Federal civilian employment, eligibility for assignment to sensitive duties, and access to classified information.

Section Three (152.4) contains summaries of reports of investigation, internal Agency memorandums and correspondence furnishing analysis of results of investigations in so far as their relationship to the criteria set forth in the E.O. 10450, in the Code of Federal Regulations and in Department of Defense and DCAA Directives and Regulations; comments and recommendations of the WHS/CAF adjudication authority with related documents, former DCAA adjudicative authority documents, and determinations by the Director, DCAA.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; E.O. 10450, 10865, and E.O. 12958, Classified National Security Information; and DoD Directive 5105.36 (32 CFR part 387).

PURPOSE(S):

To provide a basis for requesting appropriate investigations; to permit determinations on employment or retention; to authorize and record access to classified information.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'Blanket Routine Uses' that appear at the beginning of DCAA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**STORAGE:**

All sections are on paper records stored in file folders.

RETRIEVABILITY:

Folders are filed by file series then by organizational element (DCAA headquarters or DCAA field activities) and then alphabetically by last name of individual concerned.

SAFEGUARDS:

Records are stored in locked filing cabinets after normal business hours. Records are accessible only to authorized personnel who are properly cleared and trained and who require access in connection with their official duties.

RETENTION AND DISPOSAL:

Records contained in Sections One and Two pertaining to Federal employees and persons furnishing services to DCAA on a contract basis are destroyed upon separation of employees, and upon termination of the contracts for contractor personnel. Records pertaining to applicants are destroyed within one year if an appointment to DCAA is not made.

Records contained in Section Three are maintained after separation only if it contains a DCAA unfavorable personnel security determination, or a DCAA favorable personnel security determination, where the investigation or information upon which the

determination was made included significant derogatory information of the type set forth in Section 2-200 and Appendix I, DCAAM 5210.1. This information shall be maintained for five years from the date of determination.

SYSTEM MANAGER(S) AND ADDRESS:

Security Officer, Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this record system should address written inquiries to the Records Administrator, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system should address written inquiries to the Records Administrator, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

Written requests for information should contain the full name of the individual, current address and telephone number and current business address.

Acceptable identification, that is, driver's license or employing offices' identification card. Visits are limited to Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir VA 22060-6219.

CONTESTING RECORD PROCEDURES:

DCAA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DCAA Regulation 5410.10; 32 CFR part 317; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Security Officer and the Director of Human Resources Management Division at Headquarters, DCAA; Chiefs of Human Resources Management Divisions, Chiefs of Field Audit Offices and the DCAA Regional Offices and the individual concerned.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

RDCAA 152.7**SYSTEM NAME:**

Clearance Certification (*November 20, 1997, 62 FR 62003*).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with 'Primary location: Security Control Officers at DCAA Regional Offices and Field Audit Offices; Field Detachment and Defense Contract Audit Institute (DCAI). Official mailing addresses are published as an appendix to DCAA's compilation of systems of records notices.'

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Place a period after 'authorized' and delete the remainder of the entry.

* * * * *

PURPOSE(S):

Delete first paragraph and replace with 'To maintain a record of the security clearance and eligibility status of all DCAA personnel.'

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with 'Security Control Officers in DCAA Regional Offices and Field Audit Offices. Official mailing addresses are published as an appendix to DCAA's compilation of systems of records notices.'

* * * * *

RECORD SOURCE CATEGORIES:

Delete entry and replace with 'Regional Resource Managers at the DCAA Regional Offices; Chiefs of DCAA Field Audit Offices; the Manager, Defense Contract Audit Institute and the individual.'

* * * * *

RDCAA 152.7**SYSTEM NAME:**

Clearance Certification.

SYSTEM LOCATION:

Primary location: Security Control Officers at DCAA Regional Offices and Field Audit Offices; Field Detachment and Defense Contract Audit Institute (DCAI). Official mailing addresses are published as an appendix to DCAA's compilation of systems of records notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All DCAA personnel employed by the Agency.

CATEGORIES OF RECORDS IN THE SYSTEM:

Files contain interim and final security clearance and eligibility certificates attesting to type of investigation conducted and degree of access to classified information which is authorized.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Department Regulations; E.O. 10450, 10865, and E.O. 12958, Classified National Security Information; and DoD Directive 5105.36 (32 CFR part 387).

PURPOSE(S):

To maintain a record of the security clearance and eligibility status of all DCAA personnel.

To DoD contractors to furnish notice of security clearance and access authorization of DCAA employees.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'Blanket Routine Uses' that appear at the beginning of the DCAA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders.

RETRIEVABILITY:

Retrieved by last name of individual concerned.

SAFEGUARDS:

Records are stored in locked filing cabinets after normal business hours and stored in locked rooms or buildings. Records are accessible only to those authorized personnel required to act upon a request for access to classified defense information.

RETENTION AND DISPOSAL:

Records pertaining to Federal employees and persons furnishing services to DCAA on a contract basis are destroyed upon separation or transfer of employees and upon termination of contractor personnel.

Records of individuals transferring within DCAA are transferred to security control office of gaining element for maintenance.

SYSTEM MANAGER(S) AND ADDRESS:

Security Control Officers in DCAA Regional Offices and Field Audit Offices. Official mailing addresses are published as an appendix to DCAA's compilation of systems of records notices.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this record system should address written inquiries to the Records Administrator, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this record system should address written inquiries to the Records Administrator, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

The request should contain the full name of the individual, current address and telephone number, and current business address.

Personal visits may be made but are limited to those offices (Regional Offices) listed in DCAA's official mailing addresses published as an appendix to DCAA's compilation of systems of records notices. In personal visits, the individual should be able to provide acceptable identification, that is, driver's license or employing offices' identification card.

CONTESTING RECORD PROCEDURES:

DCAA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DCAA Regulation 5410.10; 32 CFR part 317; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Regional Resource Managers at the DCAA Regional Offices; Chiefs of DCAA Field Audit Offices; the Manager, Defense Contract Audit Institute and the individual.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

RDCAA 160.5

SYSTEM NAME:

Travel Orders (November 20, 1997, 62 FR 62003).

* * * * *

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219; DCAA Regional Offices; and field audit offices, whose addresses may be obtained from their cognizant regional office. Official mailing addresses are

published as an appendix to the agency's compilation of record system notices.

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with 'Assistant Director, Resources, Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, For Belvoir, VA 22060-6219; Regional Directors, DCAA; and Chiefs of Field Audit Offices, whose addresses may be obtained from their cognizant regional office. Official mailing addresses are published as an appendix to the agency's compilation of record system notices.'

* * * * *

RDCAA 160.5

SYSTEM NAME:

Travel Orders.

SYSTEM LOCATION:

Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219; DCAA Regional Offices; and field audit offices, whose addresses may be obtained from their cognizant regional office. Official mailing addresses are published as an appendix to the agency's compilation of record system notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any DCAA employee who performs official travel.

CATEGORIES OF RECORDS IN THE SYSTEM:

File contains individual's orders directing or authorizing official travel to include approval for transportation of automobiles, documents relating to dependents travel, bills of lading, vouchers, contracts, and any other documents pertinent to the individual's official travel.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 133 and DoD Directive 5105.36 which is published in 32 CFR Part 357.

PURPOSE(S):

To document all entitlements, authorizations, and paperwork associated with an employee's official travel.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the

DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'Blanket Routine Uses' that appear at the beginning of DCAA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders.

RETRIEVABILITY:

By fiscal year and alphabetically by surname. May be filed in numerical sequence by travel order number.

SAFEGUARDS:

Under control of office staff during duty hours. Building and/or office locked and/or guarded during nonduty hours.

RETENTION AND DISPOSAL:

Records are destroyed after four years.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Director, Resources, Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219; Regional Directors, DCAA; and Chiefs of Field Audit Offices, whose addresses may be obtained from their cognizant regional office. Official mailing addresses are published as an appendix to the agency's compilation of record system notices.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this record system should address written inquiries to the Records Administrator, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this record system should address written inquiries to the Records Administrator, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

The request should contain the full name of the individual, current address and telephone number, and current business address.

Personal visits may be made to those offices listed in DCAA's official mailing addresses published as an appendix to DCAA's compilation of record system notices. In personal visits the individual should be able to provide acceptable identification, that is, driver's license or employing office's identification card.

CONTESTING RECORD PROCEDURES:

DCAA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DCAA Regulation 5410.10; 32 CFR part 317; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Administrative offices; personnel offices; servicing payroll offices; employee.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

RDCAA 240.3

SYSTEM NAME:

Legal Opinions (*November 20, 1997, 62 FR 62003*).

CHANGES:

* * * * *

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Add "or legal representation" after "opinion".

* * * * *

RETENTION AND DISPOSAL:

Change "five years" to "six years".

RDCAA 240.3

SYSTEM NAME:

Legal Opinions.

SYSTEM LOCATION:

Office of General Counsel, Headquarters, Defense Contract Audits Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any DCAA employee who files a complaint, with regard to personnel issues, that requires a legal opinion or legal representation for resolution.

CATEGORIES OF RECORDS IN THE SYSTEM:

Fraud files contain interoffice memorandums, citations used in determining legal opinion, in some cases copies of investigations (FBI), copies of Agency determinations.

EEO files contain initial appeal, copies of interoffice memorandums, testimony at EEO hearings, copy of Agency determinations. Citations used in determining legal opinions.

Grievance files contain correspondence relating to DCAA employees filing grievances regarding leave, removals, resignations, suspensions, disciplinary actions, travel, citations used in determining legal opinion, Agency determinations.

MSPB Appeal files contain interoffice memorandums, citations used in determining the legal position, statements of witnesses, pleadings, briefs, MSPB decisions, notices of judicial appeals, litigation reports and correspondence with the Department of Justice.

Award files contain correspondence relating to DCAA employee awards, suggestion elevations, citations used for legal determinations, Agency determination.

Security Violation files contain interoffice correspondence relating to DCAA employee security violations, citations used in determinations, Agency determination.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. chapters 43, 51, and 75; 5 U.S.C. 301, Departmental Regulations; and the Civil Service Reform Act of 1978.

PURPOSE(S):

To maintain a historical reference for matters of legal precedence within DCAA to ensure consistency of action and the legal sufficiency of personnel actions.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The "Blanket Routine Uses" that appear at the beginning of DCAA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders.

RETRIEVABILITY:

Primary filing system is by subject; within subjects, files are alphabetical by subject, corporation, name of individual.

SAFEGUARDS:

Under staff supervision during duty hours; security guards are provided during nonduty hours.

RETENTION AND DISPOSAL:

These files are for permanent retention. They are retained in active files for six years and retired to Washington National Records Center.

SYSTEM MANAGER(S) AND ADDRESS:

Counsel, Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Records Administrator, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Records Administrator, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

Written requests for information should contain the full name of the individual, current address and telephone number.

Personal visits are limited to those offices (Headquarters and Regional offices) listed in the appendix to the agency's compilation of systems of records notices. For personal visits, the individual should be able to provide some acceptable identification, that is driver's license or employing office's identification card and give some verbal information that could be verified with "case" folder.

CONTESTING RECORD PROCEDURES:

DCAA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DCAA Regulation 5410.10; 32 CFR part 317; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Correspondence from individual's supervisor, DCAA employees, former employers, between DCAA staff members, and between DCAA and other Federal agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

RDCAA 240.5**SYSTEM NAME:**

Standards of Conduct, Conflict of Interest (*November 20, 1997, 62 FR 62003*).

CHANGES:

* * * * *

RETENTION AND DISPOSAL:

Change "five years" to "six years".

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RDCAA 240.5**SYSTEM NAME:**

Standards of Conduct, Conflict of Interest.

SYSTEM LOCATION:

Office of General Counsel, Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Any DCAA employee who has accepted gratuities from contractors or who has business, professional or financial interests that would indicate a conflict between their private interests and those related to their duties and responsibilities as DCAA personnel. Any DCAA employee who is a member or officer of an organization that is incompatible with their official government position, using public office for private gain, or affecting adversely the confidence of the public in the integrity of the Government. Any DCAA employee who has requested an ethics opinion regarding the propriety of future actions on their part.

CATEGORIES OF RECORDS IN THE SYSTEM:

Office of the General Counsel—Files contain documents and background material on any

Office of the General Counsel Files contain documents and background material on any apparent or potential conflict of interest or acceptance of gratuities by DCAA personnel. Correspondence may involve interoffice memorandums, correspondence between former DCAA employees and Headquarters staff members, citations used in legal determinations and Agency determinations.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5. U.S.C. 301, Departmental Regulations: DoD 5500.7-R, Joint Ethics Regulation (JER); and E.O. 12731.

PURPOSE(S):

To provide a historical reference file of cases that are of precedential value to ensure equality of treatment of individuals in like circumstances.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The "Blanket Routine Uses" that appear at the beginning of DCAA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**STORAGE:**

Paper records in file folders.

RETRIEVABILITY:

Primary filing system is by subject, within subject, files are alphabetical by subject, corporation, name of individual.

SAFEGUARDS:

Under staff supervision during duty hours; buildings have security guards during nonduty hours.

RETENTION AND DISPOSAL:

These files are for permanent retention. They are retained in active files for six years and then retired to Washington National Records Center.

SYSTEM MANAGER(S) AND ADDRESS:

General Counsel Headquarters, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Records Administrator, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Records Administrator, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

The request should contain the full name of the individual, current address and telephone number.

Personal visits may be made to the above address. In personal visits, the individual should be able to provide acceptable identification, that is, driver's license or employing offices' identification card, and give some verbal information that can be verified with "case" folder.

CONTESTING RECORD PROCEDURES:

DCAA's rules for accessing records, for contesting contents and appealing initial agency determination are published in DCAA Regulation 5410.10; 32 CFR part 317; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Correspondence from individual's supervisor, DCAA employees, former employees, between DCAA staff members, and between DCAA and other Federal agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 99-12389 Filed 5-17-99; 8:45 am]

BILLING CODE 5001-10-M

DEFENSE LOGISTICS AGENCY**Membership of the Defense Logistics Agency (DLA) Senior Executive Service (SES) Performance Review Board (PRB)**

AGENCY: Defense Logistics Agency, Department of Defense.

ACTION: Notice of membership—1999 DLA PRB.

SUMMARY: This notice announces the appointment of members to the Defense Logistics Agency Senior Executive Service (SES) Performance Review Board (PRB). The publication of PRB composition is required by 5 U.S.C. 4314(c)(4).

The PRB provides fair and impartial review of Senior Executive Service performance appraisals and makes recommendations to the Director, Defense Logistics Agency (DLA), with respect to pay level adjustments and performance awards, and other actions related to management of the DLA SES cadre.

EFFECTIVE DATE: July 1, 1999.

FOR FURTHER INFORMATION CONTACT: Ms. Donna Coward, Workforce Effectiveness and Development Group, Human Resources, Defense Logistics Agency, Department of Defense, Ft Belvoir, Virginia, (703) 767-6427.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the following are the names and titles of DLA personnel appointed to serve as members of the SES PRBs. Members will serve a 1-year renewable term, effective July 1, 1999.

PRB 1:

Chair: Mr. Thomas Brunk, Deputy Commander, Defense Contract Management Command

Members: Mr. George Allen, Deputy Commander, Defense Supply Center Philadelphia; Dr. Linda Furiga, Comptroller, DLA

PRB 2:

Chair: Ms. Roberta Eaton, Special Assistant for Integrity in

Contracting, General Counsel
Members: Ms. Pamela Creek,

Executive Director, Human Resources; Mr. Jeffrey Jones, Deputy Commander, Defense Logistics Support Command

Christine L. Gallo,

Acting Director, Corporate Administration, Defense Logistics Agency.

[FR Doc. 99-12437 Filed 5-17-99; 8:45 am]

BILLING CODE 3620-01-M

DEPARTMENT OF DEFENSE**Department of the Navy****Meeting of the Planning and Steering Advisory Committee (PSAC)**

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The purpose of this meeting is to discuss topics relevant to SSBN security.

DATES: The meeting will be held on May 25, 1999 from 9:00 a.m. to 4:00 p.m.

ADDRESSES: The meeting will be held at the Center for Naval Analyses, 4401 Ford Avenue, Alexandria, Virginia.

FOR FURTHER INFORMATION: Lieutenant Commander George P. Norman, CNO-N875C2, 2000 Navy Pentagon, NC-1, Washington, DC 20350-2000, telephone (703) 604-7392.

SUPPLEMENTARY INFORMATION: This notice of meeting is provided per the Federal Advisory Committee Act (5 U.S.C. App. 2). The entire agenda will consist of classified information that is specifically authorized by Executive Order to be kept secret in the interest of national defense and is properly classified pursuant to such Executive Order. Accordingly, the Secretary of the Navy has determined in writing that all sessions of the meeting shall be closed to the public because they concern matters listed in 552b(c)(1) of title 5, United States Code.

Dated: May 7, 1999.

Pamela A. Holden,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 99-12419 Filed 5-17-99; 8:45 am]

BILLING CODE 3810-FF-P

DEPARTMENT OF EDUCATION**Submission for OMB Review; Comment Request**

AGENCY: Department of Education.

SUMMARY: The Acting Leader, Information Management Group, Office of the Chief Information Officer invites

comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before June 17, 1999.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Danny Werfel, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW, Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address DWERFEL@OMB.EOP.GOV. Requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 400 Maryland Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202-4651, or should be electronically mailed to the internet address *Pat-Sherrill@ed.gov*, or should be faxed to 202-708-9346.

FOR FURTHER INFORMATION CONTACT:

Patrick J. Sherrill (202) 708-8196.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Leader, Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment at the address specified above. Copies of the requests are

available from Patrick J. Sherrill at the address specified above.

Dated: May 12, 1999.

William E. Burrow,

Acting Leader, Information Management Group, Office of the Chief Information Officer.

Office of Bilingual Education and Minority Languages Affairs

Type of Review: Extension.

Title: Applications for Grants under Emergency Immigrant Education Program.

Frequency: Annually.

Affected Public: State, local or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Burden:

Responses: 57.

Burden Hours: 9,177.

Abstract: This application is used by State educational agencies to apply for formula grants authorized under the Emergency Immigrant Education Act (Title VI of Pub. L. 98-511 as amended by Pub. L. 103-382).

[FR Doc. 99-12432 Filed 5-17-99; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Office of Arms Control and Nonproliferation Policy Proposed Subsequent Arrangement

AGENCY: Department of Energy.

ACTION: Subsequent Arrangement.

SUMMARY: This notice is being issued under the authority of Section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160). The Department is providing notice of a proposed "subsequent arrangement" under the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy Between the United States of America and the European Atomic Energy Community (EURATOM) and the Agreement for Cooperation Between the Government of the United States of America and the Government of the Federative Republic of Brazil Concerning Peaceful Uses of Atomic Energy.

This subsequent arrangement concerns the approval of RTD/BR(EU)-10 which involves the retransfer of nuclear components in the form of a secondary neutron source from Germany to Brazil for use in the Angra-2 nuclear power plant. The secondary neutron source, specially designed for use in nuclear reactors, contains 1,400 U.S.-origin antimony beryllium pellets.

The Federative Republic of Brazil has provided assurances that these components will only be used in the Angra-2 nuclear power plant and that the components will not be

retransferred to the jurisdiction of any other nation or group of nations without prior consent of the United States.

In accordance with Section 131 of the Atomic Energy Act of 1954, as amended, we have determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

For the Department of Energy.

Dated: May 12, 1999.

Edward T. Fei,

Deputy Director, International Policy and Analysis Division, Office of Arms Control and Nonproliferation.

[FR Doc. 99-12499 Filed 5-17-99; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Withdrawal of Notice of Intent To Prepare an Environmental Impact Statement (EIS) for the Transfer of Certain Operations From the Department of Energy (DOE) Mound Site

AGENCY: Department of Energy.

ACTION: Notice of withdrawal.

SUMMARY: On October 2, 1998, DOE announced its intent to prepare an EIS in accordance with the National Environmental Policy Act (NEPA) for the proposed transfer of the Heat Source/Radioisotope Thermoelectric Generator (HS/RTG) operations at the Mound Site near Miamisburg, Ohio, to an alternative DOE site. The Mound Site was to be cleaned up and eventually turned into an industrial park. However, after additional studies, the Secretary of Energy announced on March 22, 1999, that DOE has now decided to cancel the proposal to transfer these operations. Therefore, DOE is withdrawing its Notice of Intent to Prepare an Environmental Impact Statement. The decision not to pursue the proposed transfer of the HS/RTG operations from the Mound Site does not affect DOE's ongoing NEPA review of the proposed production of plutonium-238 for use in advanced radioisotope power systems for future space missions.

FOR FURTHER INFORMATION CONTACT: For general and technical information associated with the HS/RTG assembly and test operations at the Mound Site, please contact: Timothy A. Frazier, U.S. Department of Energy, P.O. Box 66, Miamisburg, OH 45343-0066. Telephone: (937) 865-3748; facsimile (937) 865-4219; electronic mail: Tim.Frazier@OHIO.DOE.GOV.

For general information on the DOE NEPA process, please contact: Carol M. Borgstrom, Director, Office of NEPA Policy and Assistance, EH-42, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0119. Telephone: (202) 586-4600 or leave a message on (800) 472-2756.

SUPPLEMENTARY INFORMATION: The Mound Site, located in Miamisburg, Ohio, was established in 1946 as part of the Atomic Energy Commission. For the past 35 years, DOE (or its predecessor) has been developing HS/RTGs at the Mound Site and supplying them to user agencies. Until the early 1990s, the Mound Site also manufactured critical nuclear weapons components. The site is currently being environmentally restored under a Comprehensive Environmental Response, Compensation and Liabilities Act (CERCLA) § 120 Agreement. DOE and its site restoration contractor had planned to complete the environmental restoration and exit the site, including the HS/RTG operations, by February 2003. DOE believed that leaving the HS/RTG operations at Mound by itself may not have been feasible for various programmatic reasons or cost effective.

On October 2, 1998, the DOE published in the **Federal Register** a Notice of Intent to prepare an EIS in compliance with the NEPA for the proposed transfer of the HS/RTG operations at the Mound Site to an alternative DOE site. Six public scoping meetings were held in November 1998 in the vicinity of the Mound Site and the following alternative locations: Oak Ridge National Laboratory, Oak Ridge, TN; Pantex Plant, near Amarillo, TX; Hanford Site, Richland, WA; Nevada Test Site, near Las Vegas, NV; and Idaho National Engineering and Environmental Laboratory, Idaho Falls, ID. The Draft EIS was in the initial stage of preparation.

DOE has decided to withdraw the proposal to transfer the HS/RTG assembly and test operations from the Mound Site. The decision to withdraw the proposal is based on a detailed cost analysis of alternate site proposals and several additional reviews by various departmental elements to determine the reasonableness and acceptability of maintaining the HS/RTG assembly and test operations at the Mound Site. The cost analysis indicated that the Department would not realize cost savings by transferring the HS/RTG assembly and test operations from the Mound Site. The review by various

departmental elements determined that maintaining the program at the Mound Site for the long-term was reasonable and that the Department could continue to ensure high levels of health and safety, materials protection, and other program requirements. These reviews, along with public comments received during the EIS scoping process, have effectively negated the need for the proposed action. Therefore, no EIS is required, and DOE hereby withdraws its notice of intent to prepare an EIS.

Issued in Washington, D.C., this 11th day of May 1999.

Earl J. Wahlquist,

Associate Director for Space and Defense Power Systems, Office of Nuclear Energy, Science, and Technology.

[FR Doc. 99-12498 Filed 5-17-99; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

International Energy Agency Meeting

AGENCY: Department of Energy.

ACTION: Notice of meeting.

SUMMARY: The Industry Advisory Board (IAB) to the International Energy Agency (IEA) will meet May 25, 1999 at the headquarters of the International Energy Agency in Paris, France.

FOR FURTHER INFORMATION CONTACT: Samuel M. Bradley, Acting Assistant General Counsel for International and Legal Policy, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585, 202-586-6738.

SUPPLEMENTARY INFORMATION: In accordance with section 252(c)(1)(A)(i) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(i)), the following meeting notice is provided:

A meeting of the Industry Advisory Board (IAB) to the International Energy Agency (IEA) will be held on May 25, 1999, at the headquarters of the IEA, 9, rue de la Fédération, Paris, France, beginning at approximately 3:00 p.m. The purpose of this meeting of the IAB is to permit attendance by representatives of its U.S. company members at a meeting of the Subgroup to Prepare the Oil Disruption Simulation Exercise of the IEA's Standing Group on Emergency Questions (SEQ) that is scheduled to be held at the aforesaid location on the aforesaid date. The Agenda for the meeting is under the control of the SEQ. It is expected that the following Agenda will be followed:

1. Report and discussion on the last meeting in Washington:

- Organization of the exercise;
- Main lines of scenario;

—Task allocation.

2. Schedule of work for September exercise.

As provided in section 252(c)(1)(A)(ii) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(ii)), this meeting is open only to representatives of members of the IAB and their counsel, representatives of members of the SEQ, representatives of the Departments of Energy, Justice, and State, the Federal Trade Commission, the General Accounting Office, Committees of the Congress, the IEA, and the European Commission, and invitees of the IAB, the SEQ, or the IEA.

Issued in Washington, D.C., May 12, 1999.

Mary Anne Sullivan,

General Counsel.

[FR Doc. 99-12500 Filed 5-17-99; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

The City of Anaheim, California Public Utilities Department; Notice of Filing

[Docket No. EL99-63-000]

May 13, 1999.

Take notice that on January 21, 1999, The City of Anaheim Public Utilities Department (Anaheim) filed a request for waiver from submitting FERC Form No. 715, "Annual Transmission Planning and Evaluation Report". Under the Commission's Rules, entities that do not use power flow analyses in their transmission planning can be granted a waiver from filing FERC Form No. 715. Anaheim states that the transmission facilities that they use to deliver its energy are all operated by other entities. For this reason, Anaheim requests a waiver from submitting FERC Form No. 715.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before June 4, 1999. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This

filing may also be viewed on the Internet at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 99-12471 Filed 5-17-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL99-64-000]

The City of Riverside, California; Notice of Filing

May 13, 1999.

Take notice that on April 29, 1999, The City of Riverside, California (Riverside) filed a request for waiver from submitting FERC Form No. 715, "Annual Transmission Planning and Evaluation Report". Under the Commission's Rules, entities that do not use power flow analyses in their transmission planning can be granted a waiver from filing FERC Form No. 715. Riverside states that it is in Southern California Edison's (SCE) control area and relies on SCE to perform the transmission planning for the area. The request states that Riverside does not have the means or the data to comply with the FERC's reporting requirements. Therefore, Riverside is requesting waiver of FERC's Form No. 715 for this year and subsequent years, as long as Riverside does not perform transmission planning, or use power flow analyses in its planning.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before June 4, 1999. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at <http://www.ferc.fed.us/>

online/rims.htm (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 99-12470 Filed 5-17-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97-346-021]

Equitrans, L.P.; Notice of Proposed Changes in FERC Gas Tariff

May 12, 1999.

Take notice that on May 5, 1999, Equitrans, L.P. (Equitrans), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, revised tariff sheets shown on Appendix A of the filing, with various effective dates in compliance with the Commission's April 29, 1999, Letter Order in the above-captioned proceeding.

Equitrans states that the purpose of this filing is to implement the uncontested January 22, 1999, Stipulation and Agreement as amended on March 31, 1999, which was approved without modification in the Letter Order with an effective date of May 1, 1999. Equitrans further states that, as a result of this compliance filing, rates are being reduced and refunds are being made to customers.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 99-12475 Filed 5-17-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR99-13-000]

Gulf States Pipeline Corporation; Notice of Petition For Rate Approval

May 12, 1999.

Take notice that on April 30, 1999, Gulf States Pipeline Corporation (Gulf States), tendered for filing pursuant to Section 284.123(b)(2) of the Commission's Regulations, a petition for rate approval for transportation services performed under Section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA). The petition is filed to comply with a Commission letter order dated March 5, 1997, in Docket No. PR96-6-000, which approved Gulf State's current rates, and required a filing on or before May 1, 1999, to justify such rates or establish new system rates. Gulf States is an intrastate pipeline, incorporated in Louisiana, whose system is located in north Louisiana. Its mailing address is 8080 North Central Expressway, #200, Dallas, Texas 75206-1815.

Gulf States proposes to increase its system rates, and percentage for recovering, in-kind, gas lost and fuel used. Accordingly, Gulf States proposes, as fair and equitable, a maximum interruptible transportation rate of \$.4400 per MMBtu, a maximum firm monthly demand charge of \$7.8352, and a maximum firm commodity charge of \$.1824 per MMBtu. Gulf States also proposes a 2% in-kind retention rate. Finally, Gulf States proposes that shippers will be required to reimburse it for filing fees incurred in connection with the implementation, commencement or continuation of Section 311 service, as will be provided for in relevant service agreements.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/>

rims.htm (call 202-208-2222 for assistance).

Linwood A. Watson, Jr.,
Acting Secretary.

[FR Doc. 99-12476 Filed 5-17-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96-290-002]

Michigan Gas Storage Company; Notice of Compliance Filing

May 12, 1999.

Take notice that on May 5, 1999, Michigan Gas Storage Company (MGS), tendered for filing Sub Fourth Revised Tariff Sheet No. 4, Sub Fifth Revised Tariff Sheet No. 4, Sub Fifth Revised Tariff Sheet No. 5, and Second Sub Sixth Revised Tariff Sheet No. 5, all part of its FERC Gas Tariff, First Revised Volume No. 1, along with accompanying workpapers and other materials. MGS did so in compliance with the Commission's April 5, 1999, Order on Initial Decision in this docket. MGS states that it makes this compliance filing without prejudice to the request for rehearing MGS filed contemporaneous with its compliance filing.

MGSCO states that a copy of this filing is available for public inspection during regular business hours at MGSCO's office at 212 W. Michigan Avenue, Jackson, MI 49201. In addition, copies of this filing have been served on all customers and applicable state regulatory agencies and on all those on the official service list in this docket.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/>

rims.htm (call 202-208-2222 for assistance).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99-12477 Filed 5-17-99; 8:45 am]

BILLING CODE 6717-d-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97-151-009]

Mid Louisiana Gas Company; Notice of Request for Waiver and Extension of Time

May 12, 1999.

Take notice that on April 30, 1999, Mid Louisiana Gas Company (Mid Louisiana), tendered for filing a motion for waiver of EDI requirements and an extension of time to comply with electronic communication and Internet transaction requirements of Commission Order Nos. 587, 587-B, 587-C, 587-G, and 587-I.

In support of its request, Mid Louisiana asserts that the company is still in the process of replacing its existing computer system and, although progress has been made on its Website, Mid Louisiana has not yet been able to achieve full compliance with the Commission's existing requirements. Mid Louisiana states that additional time is needed to complete the process. Further, Mid Louisiana requests a permanent waiver from EDI requirements asserting that Mid Louisiana's size and customer sophistication level lend themselves more adequately to Internet Website development and do not justify the investment required for EDI.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/>

rims.htm (call 202-208-2222 for assistance).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99-12473 Filed 5-17-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RP96-312-014 and GT99-26-000]

Tennessee Gas Pipeline Company; Notice of Filing

May 12, 1999.

Take notice that on April 30, 1999, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, tendered for filing (1) a copy of the transportation service agreement pursuant to Tennessee's Rate Schedule FT-A (Transportation Service Agreement) entered into by Tennessee and Caledonia Power I, L.L.C. (Caledonia), (2) a copy of the balancing agreement entered into by Tennessee and Caledonia (Balancing Agreement), (3) a copy of the Firm Transportation Discount Agreement entered into by Tennessee and Caledonia (Discount Letter Agreement), and (4) Third Revised Sheet No. 413 of Tennessee's FERC Gas Tariff, Fifth Revised Volume No. 1 (Volume No. 1 Tariff). Tennessee requests an effective date of June 1, 1999.

Tennessee states that the Transportation Service Agreement and the Discount Letter Agreement reflect a negotiated rate arrangement between Tennessee and Caledonia for transportation under Rate Schedule FT-A to be effective June 1, 1999 through May 31, 2009. Tennessee also states that it is submitting the Transportation Service Agreement and the Discount Letter Agreement for Commission approval because the Discount Letter agreement contains language which modifies the provisions of the Gas Transportation Agreement contained in Tennessee's Volume No. 1 Tariff.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings.

Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99-12474 Filed 5-17-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GT99-28-000]

Transcontinental Gas Pipe Line Corporation; Notice of Refund Report

May 12, 1999.

Take notice that on May 6, 1999, Transcontinental Gas Pipe Line Corporation (Transco) filed a report reflecting the flow through of refund received from Texas Gas Transmission.

On March 5, 1999, in accordance with Section 4 of its Rate Schedule FTNT, Transco states that it refunded to its FTNT customer, New York Power Authority, \$189,257.81 resulting from the refund of Texas Gas Transmission Docket No. RP97-344, et al. The refund covers the period from November 1, 1997 to November 30, 1998.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99-12478 Filed 5-17-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

[Docket No. PR99-12-000]

Federal Energy Regulatory
CommissionTransok, LLC; Notice of Petition for
Rate Approval

May 12, 1999.

Take notice that on April 30, 1999, Transok, LLC (Transok) filed a petition for rate approval to continue its present rates in effect on and after May 1, 1999 for interruptible Section 311 transportation services on Transok's System in Oklahoma. The present rate is \$0.1682 per MMBtu delivered.

Pursuant to Section 284.123(b)(2)(ii) of the Commission's Regulations, if the Commission does not act within 150 days of the filing date, the rates will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for similar transportation service. The Commission may, prior to the expiration of the 150 day period, extend the time for action or institute a proceeding to afford parties an opportunity for written comments and for the oral presentation of views, data and arguments.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99-12472 Filed 5-17-99; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory
Commission

[Docket No. EL99-46-000]

Capacity Benefit Margin in Computing
Available Transmission Capacity;
Notice of Early Sign-in for Capacity
Benefit Margin Conference

May 12, 1999.

Persons interested in attending the Commission staff's May 20, 1999, and May 21, 1999, technical conference on Capacity Benefit Margin (CBM), which will be held in the Commission's Meeting Room (2C), 888 First Street, NE, Washington, DC 20426, are encouraged to notify the Commission if they are attending. This early sign-in procedure will expedite the admittance of the conference attendees. The conference panelists are already signed in and do not need to provide further notification. Persons interested in attending the conference may still sign in on the day of the conference, but for faster entrance, we request that you notify Commission staff via E-mail so we can expedite your entrance into the Commission. Please include your name, the organization you are representing and your phone number. Send the E-mail to Annette Lewis at ANNETTE.LEWIS@FERC.FED.US (202) 208-2254 or Charles Faust at CHARLES.FAUST@FERC.FED.US (202) 208-0564. Notifications should be received by the Commission on or before Tuesday, May 18, 1999.

Please use the Commission's First Street entrance (the doors open at 8:00 a.m.), where a desk will be set up to process participants at the conference.

David P. Boergers,

Secretary.

[FR Doc. 99-12417 Filed 5-17-99; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION
AGENCY

[FRL-6344-9]

Agency Information Collection
Activities: Proposed Collection;
Comment Request; Investigation Into
Possible Noncompliance of Motor
Vehicles With Federal Emission
StandardsAGENCY: Environmental Protection
Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the
Paperwork Reduction Act (44 U.S.C.

3501 *et seq.*), this document announces that EPA is planning to submit the following continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB): Investigation into Possible Noncompliance of Motor Vehicles with Federal Emission Standards, EPA ICR No. 222.04, OMB Control No. 2060-0086, expiration date 5/31/99. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before July 19, 1999.

ADDRESSES: Vehicle Programs & Compliance Division (6405J), 401 M Street, SW, Washington, D.C. 20460. Interested persons may obtain a copy of the ICR without charge, by writing, faxing, or phoning the contact person below.

FOR FURTHER INFORMATION CONTACT: Kuang Wei, Office of Mobile Sources, Vehicle Program & Compliance Division, (202) 564-9329, (202) 564-2057 (fax), E-mail address: wei.kuang@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

Affected entities: Entities potentially affected by this action are private and commercial owners of motor vehicles and engines.

Title: Investigation into Possible Noncompliance of Motor Vehicles with Federal Emission Standards. (EPA ICR No. 222.04, OMB Control No. 2060-0086). This is a request for extension of a currently approved collection.

Abstract: This information collection includes three instruments that are used by the U.S. EPA to identify motor vehicles and engines for possible inclusion in its emissions control testing programs. The self-addressed postcard and owner telephone questionnaire are completed using information given by owners of vehicles or engines from a vehicle class under investigation. The maintenance verification form is administered to representatives of service facilities that performed maintenance on vehicles or engines whose owners have responded to the owner telephone questionnaire. This form is intended to be used to supply missing information when necessary. Responses to this collection are voluntary. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

The EPA would like to solicit comments to:

(i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 30 minutes per response. Burden means the total time, effort, of financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Estimated Number of Respondents: 985.

Frequency of Response: Once.

Estimated Total Annual Hour Burden: 587.

Estimated Total Annualized Cost Burden: \$28,314.

Send comments regarding these matters, or any other aspect of the information collection, including suggestions for reducing the burden, to the address listed above.

Dated: May 10, 1999.

Robert D. Brenner,

Acting Assistant Administrator for Air and Radiation.

[FR Doc. 99-12487 Filed 5-17-99; 8:45 am]

BILLING CODE 6560-50-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-6343-8]

Availability of Final Decision Document on Virginia's Section 303(d) Waters

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has prepared a final decision document identifying waters for inclusion on the list of Virginia's waters compiled pursuant to section 303(d) of the Clean Water Act. EPA has also prepared a summary report on comments submitted and responses to those comments. This information is being placed on EPA's Internet web site, Total Maximum Daily Load (TMDL) homepage for public viewing at <http://www.epa.gov/reg3wapd/tmdl/>. If access to the Internet is not available and you would like a printed copy, please contact Ms. Lenka Berlin, TMDL Management Support Branch, 3WP13, Water Protection Division, U.S. EPA Region III, 1650 Arch Street, Philadelphia, Pennsylvania, 19103-2029; or by e-mail to berlin.lenka@epamail.epa.gov; or by telephone (215) 814-5259, or fax at (215) 814-2301.

Thomas J. Maslany,

Director, Water Protection Division.

[FR Doc. 99-12489 Filed 5-17-99; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS-140278A; FRL-6080-1]

Access to Confidential Business Information by Tetra Tech

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized its contractor, Tetra Tech Environmental Management Inc. (Tetra Tech), of 200 Randolph Drive, Suite 4700, Chicago, Illinois, for access to information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be confidential business information (CBI). This notice amends the locations where access to TSCA CBI by Tetra Tech employees may occur.

DATES: Access to the confidential data submitted to EPA will occur no sooner than June 3, 1999.

FOR FURTHER INFORMATION CONTACT:

Christine Augustyniak, Acting Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-545, 401 M St., SW., Washington, DC 20460, (202) 554-1404, TDD: (202) 554-0551; e-mail: TSCA-Hotline@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: Under contract number 68-W-99-008, Tetra Tech, of 200 East Randolph Drive, Chicago, IL, will assist the Office of Waste and Chemicals Management and Regional Offices RCRA Enforcement, Permitting and Assistance Programs in implementing the requirements of RCRA, as amended and future amendments. The major areas of support include enforcement, permitting activities, Subtitle D solid waste, corrective action, and RCRA program planning. Other areas of support include underground storage tanks, biennial reporting, waste minimization, and state and tribal assistance.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number 68-W-99-008, Tetra Tech will require access to CBI submitted to EPA under all sections of TSCA to perform successfully the duties specified under the contract. Tetra Tech personnel will be given access to information submitted to EPA under all sections of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is amending the **Federal Register** notice of January 28, 1999 (64 FR 4413) (FRL-6057-2), to inform all submitters of information under all sections of TSCA, that employees of Tetra Tech will be given access to TSCA CBI at the following locations: EPA Regional facilities in Seattle, Washington and Dallas, TX; and Tetra Tech facilities at 200 East Randolph Drive, Chicago, IL and 1099 18th Street, Suite 1960, Denver, CO. Tetra Tech will be authorized access to TSCA CBI at these locations, provided it complies with the provisions of the EPA *TSCA Confidential Business Information Security Manual*.

Upon completing review of the CBI materials at the EPA Regional Facilities in Seattle, Washington and Dallas, Texas, Tetra Tech will return all materials to EPA staff.

Clearance for access to TSCA CBI under this contract may continue until December 31, 2001.

Tetra Tech personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

List of Subjects

Environmental protection, Access to confidential business information.

Dated: May 5, 1999.

Allan S. Abramson,

Director, Information Management Division, Office of Pollution and Prevention and Toxics.

[FR Doc. 99-12484 Filed 5-17-99; 8:45 am]

BILLING CODE 6560-50-F

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS-40034; FRL-6077-8]

Conditional Exemptions From TSCA Section 4 Test Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is granting conditional exemptions from Toxic Substances Control Act (TSCA) section 4 test rule requirements to certain manufacturers of chemical substances subject to these rules.

DATES: These conditional exemptions are effective May 18, 1999.

FOR FURTHER INFORMATION CONTACT: Christine Augustyniak, Associate

Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, Rm. E-543B, 401 M St., SW., Washington, DC 20460; telephone number: (202) 554-1404, TDD: (202) 554-0551; e-mail address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply To Me?

This action applies to all manufacturers of chemical substances identified in this unit that submitted an application for exemption from TSCA section 4 testing in 1998. Conditionally approved exemptions submitted in 1998 are listed below:

Chemicals	CAS No.	40 CFR citation	Company
Isopropanol	67-63-0	799.2325	ICI General Chemicals, Wilmington, DE BYK-Chemie USA, Wallingford, CT Dymon, Inc., Olathe, KS

As provided in 40 CFR 790.80, processors are not required to apply for an exemption or conduct testing unless EPA so specifies in a test rule or in a special **Federal Register** notice.

B. How Can I Get Additional Information or Copies of This Document or Other Documents Discussed in This Notice?

1. *Electronically.* You may obtain electronic copies of this document and other related documents from the EPA Internet Home Page at <http://www.epa.gov/>. To access this document, on the Home Page select "Laws and Regulations" and then look up the entry for this document under the "**Federal Register**—Environmental Documents." You can also go directly to the **Federal Register** listings at <http://www.epa.gov/fedrgstr/>.

2. *In person or by phone.* If you have any questions or need additional information about this document, you may contact the person identified in the "FOR FURTHER INFORMATION CONTACT" section. In addition, the official record for this document, including the public version, has been established under docket control number OPPTS-40034, (including comments and data submitted electronically). This record not only includes the documents that are physically located in the docket, but also includes all the documents that are referenced in those documents. A public

version of this record, including printed, paper versions of any electronic comments and data, which does not include any information claimed as Confidential Business Information (CBI) is available for inspection in the TSCA Nonconfidential Information Center, Rm. NE B-607, 401 M St., SW., Washington, DC, from 12 noon to 4 p.m., Monday through Friday, excluding legal holidays. The TSCA Nonconfidential Information Center telephone number is (202) 260-7099.

II. Background

This notice grants conditional exemptions from TSCA section 4 test rule requirements to all manufacturers of the chemical substances identified in this unit that submitted exemption applications in accordance with 40 CFR 790.80. In each case, EPA has received a letter of intent to conduct the testing from which exemption is sought. Accordingly, the Agency has conditionally approved these exemption applications because the conditions set out in 40 CFR 790.87 have been met. All conditional exemptions thus granted are contingent upon successful completion of testing and submission of data by the test sponsors according to the requirements of the applicable test rule.

If the test requirements are not met and EPA terminates a conditional exemption under 40 CFR 790.93, the Agency will notify each holder of an affected conditional exemption by

certified mail or **Federal Register** notice. This conditional approval applies to all manufacturers that submitted exemption applications for testing of the chemical substances named in the final test rules listed in this unit from January 1 through December 31, 1998. Any application received after December 31, 1998, will be addressed separately.

Testing reimbursement periods have terminated (sunset) for certain chemicals and exemption notices are no longer required for these chemicals. In accordance with 40 CFR 790.45, before the end of the reimbursement period, persons subject to a test rule and required to comply with the requirements of the rule, must submit either a letter of intent to test or an exemption application. Reimbursement period, as defined in 40 CFR 791.3, refers to a period that begins when the data from the last non-duplicative test to be completed under a test rule is submitted to EPA, and ends after an amount of time equal to that which had been required to develop that data or after 5 years, whichever is later.

An exemption application that was received by EPA for 2-ethylhexanol (CAS No. 104-76-7) was not required at the time it was submitted because the chemical has a completed testing program, the reimbursement period has sunset, and the chemical is no longer subject to TSCA section 4 reporting requirements. Exemption applications

received by EPA after the chemical's sunset date do not appear in this notice.

List of Subjects

Environmental protection, Chemicals, Hazardous substances.

Authority: 15 U.S.C. 2601, 2603.

Dated: May 4, 1999.

Charles M. Auer,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 99-12485 Filed 5-17-99; 8:45 am]

BILLING CODE 6560-50-F

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collections Being Reviewed by the Federal Communications Commission

May 6, 1999.

SUMMARY: The Federal Communications Commissions, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before July 19, 1999. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Les Smith, Federal Communications Commission, 445 12th Street, S.W.,

Room 1-A-804, Washington, DC 20554 or via the Internet to lesmith@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Les Smith at (202) 418-0217 or via the Internet at lesmith@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0126.

Title: Section 73.1820, Station Log.

Form Number: N/A.

Type of Review: Extension of currently approved collection.

Respondents: Business or other for-profit entities; and not-for-profit institutions.

Number of Respondents: 13,956.

Estimated Time per Response: 0.017 hours to 0.5 hours.

Total Annual Burden: 14,507.

Total Annual Cost: None.

Needs and Uses: Section 73.1820 requires that each licensee of an AM, FM or TV broadcast station maintain a station log. Each entry must accurately reflect the station's operation. This log should reflect adjustments to operating parameters for AM stations with directional antennas without an approved sampling system; for all stations the actual time of any observation of extinguishment or improper operation of tower lights; and entry of each test of the Emergency Alert System (EAS) for commercial stations.

The data are used by FCC staff in field investigations to assure that the licensee is operating in accordance with the technical requirements as specified in the FCC Rules and with the station authorization, and is taking reasonable measures to preclude interference to other stations. It is also used to verify that the EAS is operating properly.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 99-12408 Filed 5-17-99; 8:45 am]

BILLING CODE 6712-01-U

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collections Being Reviewed by the Federal Communications Commission

May 11, 1999.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Pub. L. 104-13. An agency

may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number.

Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before July 19, 1999. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Les Smith, Federal Communications Commission, 445 12th Street, SW, Room 1 A-804, Washington, DC 20554 or via the Internet to lesmith@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Les Smith at (202) 418-0217 or via the Internet at lesmith@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060-0003.

Title: Application for Amateur

Operator/Primary Station License.

Form Number: FCC 610.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households.

Number of Respondents: 79,000.

Estimated Time Per Response: 20 minutes (0.33 hours).

Frequency of Response: On occasion reporting requirements.

Total Annual Burden: 26,070 hours.

Total Annual Cost: \$207,600.

Needs and Uses: FCC Rules, 47 CFR

97.17, 97.19, and 97.519; the Communications Act of 1934, as amended; and International Treaties require that applicants file the FCC 610 to apply for a new or modified Amateur operator/primary station license. Form 610 may also be used to renew an Amateur operator/primary station license. Commission staff use the data to determine eligibility for radio station

authorization and to issue radio station/operator licenses. Data are also used by Compliance personnel in conjunction with Field Engineers for enforcement and interference resolution purposes. The Commission implemented a program change in which it has eliminated mailing of FCC Form 610R, and applicants may choose to file for renewal electronically via the VEC program or file FCC Form 610 manually.

OMB Approval Number: 3060-0069.

Title: Application for Commercial Radio Operator License.

Form Number: FCC 756.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households.

Number of Respondents: 13,250.

Estimated Time Per Response: 20 minutes.

Frequency of Response: On occasion reporting requirements.

Total Annual Burden: 4,373 hours.

Total Annual Cost: \$212,000.

Needs and Uses: Form 756 is used by the FCC, as authorized under Section 303(l)(1) of the Communications Act of 1934, as amended, to issue radio operator licenses to those persons found to be qualified. To properly identify oneself for an operator's license, applicants must provide their full name, date of birth, and a recent photograph. (A photograph is required of applicants for radiotelegraph licenses in accordance with Paragraph 3870 of Article 55 of the International Radio Regulations.) The form is being revised to delete the payment information, since this information is already being collected when an applicant files FCC Form 159 (Fee Remittance Advice) to make a payment to the FCC.

OMB Approval Number: 3060-0139.

Title: Application for Antenna Structure Registration.

Form Number: FCC 854/854R.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households; Businesses or other for-profit entities; Non-profit institutions; and State, Local, or Tribal Government.

Number of Respondents: 9,000.

Estimated Time Per Response: 30 minutes.

Frequency of Response: On occasion reporting requirements; Third party disclosure.

Total Annual Burden: 6,750 hours.

Total Annual Cost: \$181,800.

Needs and Uses: FCC Forms 854/854R are to register structures used for wire or radio communication services within the United States, or to make changes to an existing registered structure, or to

notify the Commission of the dismantlement of a structure. This revision seeks approval to combine FCC Forms 854ULS and 854-O due to the costs involved in programming separate forms for electronic filing. FCC 854ULS will collect Taxpayer Identification Number (TIN) of the antenna structure owner. Additionally, the form collects a Sub-Group Identification Number (SGIN) in cases where an entity such as a governmental entity or academic institution is divided into separate groups where each is responsible for its own registration. Antenna structure owners will be required to file either the current form or the new form, depending upon the timeframe in which the Antenna Structure Registration database is converted to ULS. Owners will be required to file the current form 854 until such time as a public notice is issued announcing conversion to ULS and requirements to begin using the Form 854ULS, then Form 854 process will no longer be available.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 99-12409 Filed 5-17-99; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

Differences in Capital and Accounting Standards Among the Federal Banking and Thrift Agencies; Report to Congressional Committees

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Report to the Committee on Banking and Financial Services of the U.S. House of Representatives and to the Committee on Banking, Housing, and Urban Affairs of the United States Senate Regarding Differences in Capital and Accounting Standards Among the Federal Banking and Thrift Agencies.

SUMMARY: This report has been prepared by the FDIC pursuant to section 37(c) of the Federal Deposit Insurance Act (12 U.S.C. 1831n(c)). Section 37(c) requires each federal banking agency to report to the Committee on Banking and Financial Services of the House of Representatives and to the Committee on Banking, Housing, and Urban Affairs of the Senate any differences between any accounting or capital standard used by such agency and any accounting or capital standard used by any other such agency. The report must also contain an explanation of the reasons for any discrepancy in such accounting and

capital standards and must be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Robert F. Storch, Chief, Accounting Section, Division of Supervision, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, D.C. 20429, telephone (202) 898-8906.

SUPPLEMENTARY INFORMATION: The text of the report follows:

Report to the Committee on Banking and Financial Services of the U.S. House of Representatives and to the Committee on Banking, Housing, and Urban Affairs of the United States Senate Regarding Differences in Capital and Accounting Standards Among the Federal Banking and Thrift Agencies

A. Introduction

The Federal Deposit Insurance Corporation (FDIC) has prepared this report pursuant to section 37(c) of the Federal Deposit Insurance Act. Section 37(c) requires the agency to submit a report to specified Congressional Committees describing any differences in regulatory capital and accounting standards among the federal banking and thrift agencies, including an explanation of the reasons for these differences. Section 37(c) also requires the FDIC to publish this report in the **Federal Register**. This report covers differences existing during 1998 and developments affecting these differences.

The FDIC, the Board of Governors of the Federal Reserve System (FRB), and the Office of the Comptroller of the Currency (OCC) (hereafter, the banking agencies) have substantially similar leverage and risk-based capital standards. While the Office of Thrift Supervision (OTS) employs a regulatory capital framework that also includes leverage and risk-based capital requirements, it differs in some respects from that of the banking agencies. Nevertheless, the agencies view the leverage and risk-based capital requirements as minimum standards and most institutions are expected to operate with capital levels well above the minimums, particularly those institutions that are expanding or experiencing unusual or high levels of risk.

The banking agencies, under the auspices of the Federal Financial Institutions Examination Council (FFIEC), have developed uniform Reports of Condition and Income (Call Reports) for all insured commercial banks and FDIC-supervised savings banks. The OTS requires each savings association to file the Thrift Financial Report (TFR). The reporting standards

for recognition and measurement in both the Call Report and the TFR are consistent with generally accepted accounting principles (GAAP). Thus, there are no significant differences in reporting standards among the agencies. However, two minor differences remain between the standards of the banking agencies and those of the OTS.

Section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4803) requires the banking agencies and the OTS to conduct a systematic review of their regulations and written policies in order to improve efficiency, reduce unnecessary costs, and eliminate inconsistencies. It also directs the four agencies to work jointly to make uniform all regulations and guidelines implementing common statutory or supervisory policies. The results of these efforts must be "consistent with the principles of safety and soundness, statutory law and policy, and the public interest." The four agencies' ongoing efforts to eliminate existing differences among their regulatory capital standards as part of the Section 303 review are discussed in the following section.

B. Differences in Capital Standards Among the Federal Banking and Thrift Agencies

B.1. Minimum Leverage Capital

The banking agencies have established leverage capital standards based upon the definition of Tier 1 (or core) capital contained in their risk-based capital standards. These standards require the most highly-rated banks (i.e., those with a composite rating of "1" under the Uniform Financial Institutions Rating System (UFIRS)) to maintain a minimum leverage capital ratio of at least 3 percent if they are not anticipating or experiencing any significant growth and meet certain other conditions. All other banks must maintain a minimum leverage capital ratio that is at least 100 to 200 basis points above this minimum (i.e., an absolute minimum leverage ratio of not less than 4 percent).

The OTS has a 3 percent core capital and a 1.5 percent tangible capital leverage requirement for savings associations. However, the OTS' Prompt Corrective Action rule requires a savings association to have a 4 percent leverage capital ratio (or a 3 percent leverage capital ratio if it is rated a composite "1" under the UFIRS) in order for the association to be considered "adequately capitalized." Consequently, the 4 percent leverage capital ratio is, in effect, the controlling leverage capital

standard for savings associations other than those rated a composite "1."

As a result of the agencies' section 303 review of their regulatory capital standards, the agencies issued a proposal for public comment on October 27, 1997, which, among other provisions, would establish a uniform leverage requirement. As proposed, institutions rated a composite 1 under the Uniform Financial Institutions Rating System would be subject to a minimum 3 percent leverage ratio and all other institutions would be subject to a minimum 4 percent leverage ratio. This change would simplify and streamline the agencies' leverage rules and make them uniform. On December 18, 1998, the FDIC Board of Directors approved a final rule adopting the uniform leverage requirement as proposed. After all four of the agencies approved this final rule, it was published on March 2, 1999 (64 **Federal Register** 10194), and took effect on April 1, 1999.

B.2. Interest Rate Risk

Section 305 of the FDIC Improvement Act of 1991 mandates that the agencies' risk-based capital standards take adequate account of interest rate risk. In August 1995, each of the banking agencies amended its capital standards to specifically include an assessment of a bank's interest rate risk, as measured by its exposure to declines in the economic value of its capital due to changes in interest rates, in the evaluation of bank capital adequacy. In June 1996, the banking agencies issued a Joint Agency Policy Statement on Interest Rate Risk that provides guidance on sound practices for managing interest rate risk. This policy statement does not establish a standardized measure of interest rate risk nor does it create an explicit capital charge for interest rate risk. Instead, the policy statement identifies the standards that the banking agencies will use to evaluate the adequacy and effectiveness of a bank's interest rate risk management.

In 1993, the OTS adopted a final rule that adds an interest rate risk component to its risk-based capital standards. Under this rule, savings associations with a greater than normal interest rate exposure must take a deduction from the total capital available to meet their risk-based capital requirement. The deduction is equal to one half of the difference between the institution's actual measured exposure and the normal level of exposure. The OTS has partially implemented this rule by formalizing the review of interest rate risk; however, no deductions from

capital are being made. Thus, the regulatory capital approach to interest rate risk adopted by the OTS differs from that of the banking agencies.

B.3. Subsidiaries

The banking agencies generally consolidate all significant majority-owned subsidiaries of the parent bank for regulatory capital purposes. The purpose of this practice is to assure that capital requirements are related to all of the risks to which the bank is exposed. For subsidiaries that are not consolidated on a line-for-line basis, their balance sheets may be consolidated on a pro-rata basis, bank investments in such subsidiaries may be deducted entirely from capital, or the investments may be risk-weighted at 100 percent, depending upon the circumstances. These options for handling subsidiaries for purposes of determining the capital adequacy of the parent bank provide the banking agencies with the flexibility necessary to ensure that institutions maintain capital levels that are commensurate with the actual risks involved.

Under the OTS' capital guidelines, a statutorily mandated distinction is drawn between subsidiaries engaged in activities that are permissible for national banks and subsidiaries engaged in "impermissible" activities for national banks. For regulatory capital purposes, subsidiaries of savings associations that engage only in permissible activities are consolidated on a line-for-line basis, if majority-owned, and on a pro rata basis, if ownership is between 5 percent and 50 percent. For subsidiaries that engage in impermissible activities, investments in, and loans to, such subsidiaries are deducted from assets and capital when determining the capital adequacy of the parent.

B.4. Servicing Assets and Intangible Assets

On August 10, 1998, the four agencies jointly published a final rule (63 FR 42667) revising the treatment of servicing assets for regulatory capital purposes. As amended, the agencies' rules permit servicing assets and purchased credit card relationships to count toward capital requirements, subject to certain limits. The final rule increased the aggregate regulatory capital limit on these two categories of assets from 50 percent to 100 percent of Tier 1 capital. In addition, for the first time, servicing assets on financial assets other than mortgages were recognized (rather than deducted) for regulatory capital purposes. However, these nonmortgage servicing assets are

combined with purchased credit card relationships and this combined amount is limited to no more than 25 percent of an institution's Tier 1 capital. Before applying these Tier 1 capital limits, mortgage servicing assets, nonmortgage servicing assets, and purchased credit card relationships are each first limited to the lesser of 90 percent of their fair value or 100 percent of their book value (net of any valuation allowances). Any servicing assets and purchased credit card relationships that exceed the relevant limits, as well as all other intangible assets such as goodwill and core deposit intangibles, are deducted from capital and assets in calculating an institution's Tier 1 capital.

The OTS' capital rules governing servicing assets and intangible assets contain two differences from the banking agencies' rules that, with the passage of time, have become relatively insignificant. Under its rules, the OTS has grandfathered, i.e., does not deduct from regulatory capital, core deposit intangibles acquired before February 1994 up to 25 percent of Tier 1 capital and all purchased mortgage servicing rights acquired before February 1990.

B.5. Capital Requirements for Recourse Arrangements

B.5.a. Senior-Subordinated Structures—Some asset securitization structures involve the creation of senior and subordinated classes of securities or other financial instruments. When a bank originates such a transaction and retains a subordinated interest, the banking agencies generally require that the bank maintain risk-based capital against its subordinated interest plus all more senior interests unless the low-level recourse rule applies.¹ However, when a bank acquires a subordinated interest in a pool of assets that it did not own, the banking agencies assign the investment in the subordinated interest to the 100 percent risk weight category.

In general, unless the low-level recourse rule applies, the OTS requires a thrift that holds the subordinated interest in a senior-subordinated structure to maintain capital against the subordinated interest plus all more senior interests regardless of whether the subordinated interest has been retained or has been purchased.

¹ When assets are sold with limited recourse, the banking and thrift agencies' risk-based capital standards limit the amount of capital that must be maintained against this exposure to the lesser of the amount of the recourse retained (e.g., through the retention of a subordinated interest) or the amount of risk-based capital that would otherwise be required to be held against the assets that were sold, i.e., the full effective risk-based capital charge. This is known as the "low-level recourse" rule.

On November 5, 1997, the banking and thrift agencies issued a proposal that, among other provisions, generally would treat both retained and purchased subordinated interests similarly for risk-based capital purposes, i.e., banks and thrifts would be required to hold capital against the subordinated interest plus all more senior interests unless the low-level recourse rule applies. The proposal also includes a multi-level approach to capital requirements for asset securitizations. The multi-level approach would vary the risk-based capital requirements for positions in securitizations, including subordinated interests, according to their relative risk exposure. The comment period for the proposal ended on February 3, 1998. The agencies have evaluated the comments received and, based on guidance received from the FFIEC, are working jointly to develop a revised proposal.

B.5.b. Recourse Servicing—The right to service loans and other financial assets may be retained when the assets are sold. This right also may be acquired from another entity. Regardless of whether servicing rights are retained or acquired, recourse is present whenever the servicer must absorb credit losses on the assets being serviced. The banking agencies and the OTS require an institution to maintain risk-based capital against the full amount of assets sold by the institution if the institution, as servicer, must absorb credit losses on those assets. Additionally, the OTS applies a capital charge to the full amount of assets being serviced by a thrift that has purchased the servicing from another party if the thrift is required to absorb credit losses on the assets being serviced.

The agencies' November 1997 risk-based capital proposal would require banking organizations that purchase loan servicing rights which provide loss protection to the owners of the serviced loans to begin to hold capital against those loans, thereby making the risk-based capital treatment of these servicing rights uniform for banks and savings associations. As mentioned above, after evaluating the comments received on the proposal and receiving guidance from the FFIEC, the agencies are developing a revised recourse proposal.

B.6. Collateralized Transactions

The FRB and the OCC assign a zero percent risk weight to claims collateralized by cash on deposit in the institution or by securities issued or guaranteed by the U.S. Government or the central governments of countries

that are members of the Organization of Economic Cooperation and Development (OECD), provided a positive margin of collateral protection is maintained daily.

The FDIC and the OTS assign a 20 percent risk weight to claims collateralized by cash on deposit in the institution or by securities issued or guaranteed by the U.S. Government or OECD central governments.

As part of the Section 303 review of their capital standards, the banking and thrift agencies issued a joint proposal in August 1996 that would permit collateralized claims that meet criteria that are uniform among all four agencies to be eligible for a zero percent risk weight. In general, this proposal would allow institutions supervised by the FDIC and the OTS to hold less capital for transactions collateralized by cash or U.S. or OECD government securities. The proposal would eliminate the differences among the agencies regarding the capital treatment of collateralized transactions. The agencies are continuing to work together to complete a uniform final rule for collateralized transactions.

B.7. Presold Residential Construction Loans

The four agencies assign a 50 percent risk weight to qualifying loans that a builder has obtained to finance the construction of one-to-four family residential properties. These properties must be presold, and the lending relationship must meet certain other criteria. The OTS and the OCC rules indicate that the property must be presold before the construction loan is made in order for the loan to qualify for the 50 percent risk weight. The FDIC and FRB permit loans to builders for residential construction to qualify for the 50 percent risk weight once the property is presold, even if that event occurs after the construction loan has been made. Until the property is presold, the construction loan normally would be assigned to the 100 percent risk weight category.

As a result of their Section 303 review, the agencies' previously mentioned October 27, 1997, regulatory capital proposal includes a provision under which the OTS and the OCC would adopt the treatment of presold residential construction loans followed by the FDIC and the FRB. This would make the agencies' rules in this area uniform. On December 18, 1998, the FDIC Board of Directors approved a final rule that, as proposed, retains the existing FDIC-FRB treatment of presold residential construction loans. After all four of the agencies approved this final

rule, it was published on March 2, 1999, and took effect on April 1, 1999.

B.8. Junior Liens on One-to-Four Family Residential Properties

In some cases, a bank may make two loans on a single residential property, one secured by a first lien, the other by a junior lien. When there are no intervening liens, the FRB and the OTS view both loans as a single extension of credit secured by a first lien and assign the combined loan amount a 50 percent risk weight if the combined loans satisfy prudent underwriting standards, including a prudent loan-to-value ratio, and are performing adequately. If these conditions are not met, e.g., if the combined loan amount exceeds a prudent loan-to-value ratio, the combined loans are assigned to the 100 percent risk weight category. The FDIC also combines the first and junior liens to determine the appropriateness of the loan-to-value ratio, but it applies the risk weights differently than the FRB and the OTS. If the combined loans satisfy prudent underwriting standards and are performing adequately, the FDIC risk weights the first lien at 50 percent and the junior lien at 100 percent; otherwise, both liens are risk-weighted at 100 percent. This combining of first and junior liens is intended to avoid possible circumvention of the capital requirement and to capture the risks associated with the combined loans.

The OCC treats all first and junior liens separately. It assigns the loan secured by the first lien, if it has been prudently underwritten, to the 50 percent risk weight category; otherwise, it assigns the loan to the 100 percent risk weight category. In all cases, the OCC assigns the loan secured by the junior lien to the 100 percent risk weight category.

As a result of the Section 303 review of their capital standards, the agencies proposed on October 27, 1997, to extend the OCC's treatment of junior liens on one-to-four family residential properties to all four agencies and thereby eliminate this difference among the agencies. However, after considering the comments received on the proposal, the agencies concluded that it would be more appropriate to adopt the treatment of junior liens followed by the FRB and the OTS. On December 18, 1998, the FDIC Board of Directors approved a final rule that takes this FRB-OTS approach. After all four of the agencies approved this final rule, it was published on March 2, 1999, and took effect on April 1, 1999.

B.9. Mutual Funds

The banking agencies assign the entire amount of a bank's holdings in a mutual fund to the risk category appropriate to the highest risk asset that a particular mutual fund is permitted to hold under its operating rules. Thus, the banking agencies take into account the maximum degree of risk to which a bank may be exposed when investing in a mutual fund because the composition and risk characteristics of the fund's future holdings cannot be known in advance. In no case, however, may a risk-weight of less than 20 percent be assigned to an investment in a mutual fund.

The OTS applies a capital charge appropriate to the riskiest asset that a mutual fund is actually holding at a particular time, but not less than 20 percent. In addition, both the OTS and the OCC guidelines also permit, on a case-by-case basis, investments in mutual funds to be allocated on a pro rata basis. However, the OTS and the OCC apply the pro rata allocation differently. While the OTS applies the allocation based on the actual holdings of the mutual fund, the OCC applies it based on the highest amount of holdings the fund is permitted to hold as set forth in its prospectus.

As part of the agencies' Section 303 review of their regulatory capital standards, one provision of their October 27, 1997, proposal would apply the banking agencies' treatment of mutual funds to all institutions. However, the proposal also would permit institutions, at their option, to adopt the OCC's pro rata allocation alternative for risk weighting investments in mutual funds. This proposal would make the agencies' risk-based capital rules in this area uniform, thereby eliminating this capital difference. On December 18, 1998, the FDIC Board of Directors approved a final rule that adopts the mutual fund treatment that had been proposed. After all four of the agencies approved this final rule, it was published on March 2, 1999, and took effect on April 1, 1999.

B.10. Noncumulative Perpetual Preferred Stock

Under the banking and thrift agencies' capital standards, noncumulative perpetual preferred stock is a component of Tier 1 capital. The FDIC's capital standards define noncumulative perpetual preferred stock as perpetual preferred stock where the issuer has the option to waive the payment of dividends and where the dividends so waived do not accumulate to future periods and do not represent a

contingent claim on the issuer. Under the FRB's capital standards, perpetual preferred stock is noncumulative if the issuer has the ability and legal right to defer or eliminate preferred dividends. For these two agencies, for a perpetual preferred stock issue to be considered noncumulative, the issue may not permit the accruing or payment of unpaid dividends in any form, including the form of dividends payable in common stock. Thus, if the issuer of perpetual preferred stock is required to pay dividends in a form other than cash when cash dividends are not or cannot be paid, the issuer does not have the option to waive or eliminate dividends and the stock would not qualify as noncumulative. The OCC's capital standards do not explicitly define noncumulative perpetual preferred stock, but the OCC normally has not considered perpetual preferred stock issues with this type of dividend requirement to be noncumulative.

The OTS defines as noncumulative those issues of perpetual preferred stock where the unpaid dividends are not carried over to subsequent dividend periods. This definition does not address the issuer's ability to waive dividends. As a result, the OTS has permitted perpetual preferred stock issues that require the payment of dividends in the form of stock in the issuer when cash dividends are not paid to qualify as noncumulative.

B.11. Limitation on Subordinated Debt and Limited-Life Preferred Stock

Consistent with the Basle Accord, the internationally agreed-upon risk-based capital framework which the banking agencies' risk-based capital standards implement, the banking agencies limit the amount of subordinated debt and intermediate-term preferred stock that may be treated as part of Tier 2 capital to an amount not to exceed 50 percent of Tier 1 capital. In addition, all maturing capital instruments must be discounted by 20 percent in each of the last five years before maturity. The banking agencies adopted this approach in order to emphasize equity versus debt in the assessment of capital adequacy.

The OTS has no limitation on the ratio of maturing capital instruments as part of Tier 2 capital. Furthermore, for all maturing instruments issued after November 7, 1989, thrifts have the option of using either (a) the discounting approach used by the banking regulators, or (b) an approach which allows for the full inclusion of all such instruments provided that the amount maturing in any one year does not exceed 20 percent of the thrift's total capital. As for maturing capital

instruments issued on or before November 7, 1989, the OTS has grandfathered them with respect to the discounting requirement.

B.12. Privately-Issued Mortgage-Backed Securities

The banking agencies, in general, place privately-issued mortgage-backed securities in either the 50 percent or 100 percent risk-weight category, depending upon the appropriate risk category of the underlying assets. However, privately-issued mortgage-backed securities, if collateralized by government agency or government-sponsored agency securities, are generally assigned to the 20 percent risk weight category.

The OTS assigns privately-issued high-quality mortgage-related securities to the 20 percent risk weight category. In general, these are privately-issued mortgage-backed securities that are rated in one of the two highest rating categories, e.g., AA or better, by at least one nationally recognized statistical rating organization.

B.13. Nonresidential Construction and Land Loans

The banking agencies assign loans for nonresidential real estate development and construction purposes to the 100 percent risk weight category. The OTS generally assigns these loans to the same 100 percent risk category. However, if the amount of the loan exceeds 80 percent of the fair value of the property, the OTS deducts the excess portion from assets and total capital.

B.14. "Covered Assets"

The banking agencies generally place assets subject to guarantee arrangements by the FDIC or the former Federal Savings and Loan Insurance Corporation in the 20 percent risk weight category. The OTS places these "covered assets" in the zero percent risk-weight category.

B.15. Pledged Deposits and Nonwithdrawable Accounts

The OTS' capital standards permit savings associations to include pledged deposits and nonwithdrawable accounts that meet OTS' criteria, Income Capital Certificates, and Mutual Capital Certificates in regulatory capital.

Instruments such as pledged deposits, nonwithdrawable accounts, Income Capital Certificates, and Mutual Capital Certificates do not exist in the banking industry and are not addressed in the banking agencies' capital standards.

B.16. Agricultural Loan Loss Amortization

In the computation of regulatory capital, those banks that were accepted into the agricultural loan loss amortization program pursuant to Title VIII of the Competitive Equality Banking Act of 1987 were permitted to defer and amortize certain losses related to agricultural lending that were incurred on or before December 31, 1991. These losses had to be amortized over seven years. The unamortized portion of these losses was included as an element of Tier 2 capital under the banking agencies' risk-based capital standards.

Thriffs were not eligible to participate in the agricultural loan loss amortization program established by this statute.

Because the banking agencies' agricultural loan loss amortization program ended on December 31, 1998, this difference has now been eliminated.

C. Differences in Accounting Standards Among the Federal Banking and Thrift Agencies

C.1. Push Down Accounting

Push down accounting is the establishment of a new accounting basis for a depository institution in its separate financial statements as a result of a substantive change in control. Under push down accounting, when a depository institution is acquired in a purchase (but not in a pooling of interests), yet retains its separate corporate existence, the assets and liabilities of the acquired institution are restated to their fair values as of the acquisition date. These values, including any goodwill, are reflected in the separate financial statements of the acquired institution as well as in any consolidated financial statements of the institution's parent.

The banking agencies require push down accounting when there is at least a 95 percent change in ownership. This approach is generally consistent with accounting interpretations issued by the staff of the Securities and Exchange Commission.

The OTS requires push down accounting when there is at least a 90 percent change in ownership.

C.2. Negative Goodwill

Under Accounting Principles Board Opinion No. 16, "Business Combinations," negative goodwill arises when the fair value of the net assets acquired in a purchase business combination exceeds the cost of the acquisition and a portion of this excess remains after the values otherwise

assignable to the acquired noncurrent assets have been reduced to zero.

The banking agencies require negative goodwill to be reported as a liability on the balance sheet and do not permit it to be netted against goodwill that is included as an asset. This ensures that all goodwill assets are deducted in regulatory capital calculations consistent with the Basle Accord.

The OTS permits negative goodwill to offset goodwill assets on the balance sheet.

Dated at Washington, DC, this 12th day of May, 1999.

Federal Deposit Insurance Corporation.

Robert E. Feldman,
Executive Secretary.

[FR Doc. 99-12421 Filed 5-17-99; 8:45 am]

BILLING CODE 6714-01-P

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 1, 1999.

A. Federal Reserve Bank of Atlanta
(Lois Berthaume, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303-2713:

1. *Community Financial Group, Inc.*, Nashville, Tennessee; through its subsidiary bank, The Bank of Nashville, Nashville, Tennessee, to acquire an 80 percent joint venture interest in

Machinery Leasing Company of North America, Inc., Nashville, Tennessee, and thereby engage in leasing activities, pursuant to § 225.28(b)(3) of Regulation Y. The co-venturer is Sky Masters, LLC, Nashville, Tennessee.

B. Federal Reserve Bank of San Francisco (Maria Villanueva, Manager of Analytical Support, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105-1579:

1. *Dai-Ichi Kangyo Bank, Limited*, Tokyo, Japan; to acquire Newcourt Credit Group, Inc., Toronto, Canada, and thereby engage in extending credit and servicing loans, pursuant to § 225.28(b)(1) of Regulation Y; engaging in activities related to the extension of credit, pursuant to § 225.28(b)(2) of Regulation Y; leasing personal or real property or acting as agent, broker, or adviser in leasing such property, pursuant to § 225.28(b)(3) of Regulation Y; financial and investment advisory activities, pursuant to § 225.28(b)(6) of Regulation Y; and providing agency transactional services for customer investments, pursuant to § 225.28(b)(7) of Regulation Y.

Board of Governors of the Federal Reserve System, May 12, 1999.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 99-12407 Filed 5-17-99; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control And Prevention

[INFO-99-18]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506 (c) (2) (A) of the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention is providing opportunity for public comment on proposed data collection projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 639-7090.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques for other forms of information technology. Send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS-D24, Atlanta, GA 30333. Written comments should be received with 60 days of this notice.

Proposed Project

1. School Health Policies and Programs Study 2000 (SHPPS 2000)—(0920-0445)—Revision—The National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP). The purpose of this request is to obtain OMB clearance to conduct the main data collection studies and the validity/reliability studies. The pilot portion of the data collection was approved in April. Upon the completion of the pilot this package will be submitted for OMB review for the remainder of the survey. The studies involve school health policies and programs in elementary, middle/junior, and senior high schools nationwide. A similar study was conducted in 1994 (OMB No. 0920-0340). SHPPS 2000 will assess the characteristics of eight components of school health programs at the elementary, middle/junior, and senior high school levels: health education, physical education and activity, health services, food service, school policy and environment, mental health and social services, faculty and staff health promotion, and family and community involvement. SHPPS 2000 data will be used to provide end-of-decade measures for 18 national health objectives for 2000 and as a baseline measure for at least 17 draft objectives for 2010. No other national source of data exists for these 2000 and draft 2010 objectives. The data also will have significant implications for policy and program development for school health programs nationwide. The total estimated cost to respondents \$602,664.

ANNUAL BURDEN HOURS FOR SHPPS 2000 MAIN DATA COLLECTION, SPRING 2000

Questionnaire/activity	Respondent	Number of respondents	Burden hours per respondent	Total burden hours
State Health Education	State officials	51	1.00	51.0
State Physical Education and Activity	State officials	51	1.00	51.0
State Health Services	State officials	51	1.00	51.0
State Food Service	State officials	51	1.00	51.0
State Questionnaire on School Policy and Environment.	State officials	51	1.25	63.8
State Mental Health and Social Services	State officials	51	1.00	51.0
State Faculty and Staff Health Promotion	State officials	51	0.50	25.5
Assist with identifying state level respondents and with recruiting districts and schools.	State officials	51	1.00	51.0
District Health Education	District officials	1148	1.00	1148.0
District Physical Education and Activity	District officials	1148	1.00	1148.0
District Health Services	District officials	1148	1.00	1148.0
District Food Service	District officials	1148	1.00	1148.0
District Questionnaire on School Policy and Environment.	District officials	1148	1.25	1435.0
District Mental Health and Social Services	District officials	1148	1.00	1148.0
District Faculty and Staff Health Promotion	District officials	1148	0.50	574.0
Assist with identifying district and school level respondents and with recruiting schools.	District officials	350	1.00	350.0

ANNUAL BURDEN HOURS FOR SHPPS 2000 MAIN DATA COLLECTION, SPRING 2000—Continued

Questionnaire/activity	Respondent	Number of respondents	Burden hours per respondent	Total burden hours
Assist with identifying and scheduling school level respondents.	School officials	1539	1.00	1539.0
School Health Education	Health education lead teachers, principals, or designees.	1539	1.00	1539.0
School Physical Education and Activity	Physical education lead teachers, principals, or designees.	1539	1.00	1539.0
School Health Services	School nurses, principals, or designees	1539	1.00	1539.0
School Food Service	Food service managers, principals, or designees	1539	1.00	1539.0
School Questionnaire on School Policy and Environment.	Principals or designees	1539	1.50	2308.5
School Mental Health and Social Services	Counselors, principals, or designees	1539	1.00	1539.0
School Faculty and Staff Health Promotion	Principals or designees	1539	0.50	769.5
Health Education Classroom Teacher	Health education teachers (Average 1.5 per school).	2309	0.80	1847.2
Physical Education and Activity Classroom Teacher.	Physical education teachers (Average 2 per school).	3078	0.80	2462.4
Total .....	.....	26,493	.....	25,115.9

ANNUAL BURDEN HOURS FOR VALIDITY/RELIABILITY STUDY, SPRING 2000

Questionnaire	Respondent	Number of respondents	Burden hours per respondent	Total burden hours
State Health Education	State officials	32	0.25	8.0
State Physical Education and Activity	State officials	32	0.25	8.0
State Health Services	State officials	32	0.20	6.4
State Food Service	State officials	32	0.20	6.4
State Questionnaire on School Policy and Environment.	State officials	32	0.40	12.8
State Mental Health and Social Services	State officials	32	0.25	8.0
State Faculty and Staff Health Promotion	State officials	32	0.20	6.4
District Health Education	District officials	82	0.25	20.5
District Physical Education and Activity	District officials	82	0.25	20.5
District Health Services	District officials	82	0.20	16.4
District Food Service	District officials	82	0.20	16.4
District Questionnaire on School Policy and Environment.	District officials	82	0.40	32.8
District Mental Health and Social Services	District officials	82	0.25	20.5
District Faculty and Staff Health Promotion	District officials	82	0.40	32.8
School Health Education	Health education lead teachers, principals, or designees.	82	0.80	65.6
School Physical Education and Activity	Physical education lead teachers, principals, or designees.	82	0.80	65.6
School Health Services	School nurses, principals, or designees	82	0.80	65.6
School Food Service	Food service managers, principals, or designees	82	0.80	65.6
School Questionnaire on School Policy and Environment.	Principals or designees	82	1.25	102.5
School Mental Health and Social Services	Counselors, principals, or designees	82	0.80	65.6
School Faculty and Staff Health	Principals or designees	82	0.40	32.8
Promotion Health Education Classroom Teacher	Health education teachers (Average 1.5 per school).	82	0.80	65.6
Physical Education and Activity Classroom Teacher.	Physical education teachers (Average 2 per school).	82	0.80	65.6
Total .....	.....	1,536	.....	810.4

ANNUAL BURDEN HOURS ACROSS ALL SHPPS 2000 STUDY COMPONENTS

Study component	Number of respondents	Total burden hours
Main Study Data Collection, Spring 2000	26,493	25,115.9
Validity/Reliability Study, Spring 2000	1,536	810.4
Total	28,029	25,926.3

Dated: May 12, 1999.

Nancy Cheal,

Acting Associate Director for Policy Planning and Evaluation, Centers for Disease Control and Prevention.

[FR Doc. 99-12442 Filed 5-17-99; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 99109]

Addressing Asthma from a Public Health Perspective

Notice of Availability of Funds

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year FY 1999 funds for a cooperative agreement program titled "Addressing Asthma from a Public Health Perspective". This program addresses the "Healthy People 2000" priority area of Environmental Health.

The purpose of this program is to provide the impetus to begin development of program capacity to address asthma from a public health perspective with the purpose to bring about: (1) A focus of asthma-related activity within the agency; (2) an increased understanding of asthma-related data and its application to program planning through development of an ongoing surveillance system; (3) an increased recognition within the public health structure of the state or territory of the potential to use a public health approach to reduce the burden of asthma; (4) linkages of the health agency to the many agencies and organizations addressing asthma in the population; and (5) participation in intervention program activities.

B. Eligible Applicants

Assistance will be provided only to the health departments of States or their bona fide agents, including the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, federally recognized Indian tribal governments, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.

C. Availability of Funds

Approximately \$600,000 is available in FY 1999 to fund approximately three

awards. It is expected that the average award will be \$200,000 and will begin on or about September 30, 1999 for a 12-month budget period within a project period of up to three years. Funding estimates may change. Continuation awards within an approved project period will be made on the basis of satisfactory progress as evidenced by required reports and the availability of funds.

D. Program Requirements

In conducting activities to achieve the purpose of this program, the recipient will be responsible for the activities under 1. Recipient Activities, and CDC will be responsible for the activities under 2. CDC Activities.

1. Recipient Activities

a. Develop an asthma surveillance system and begin the statewide intervention program;

b. Develop and organize collaborative linkages with appropriate agencies and organizations statewide to together (1) systematically describe the asthma problem in the state; (2) identify available resources; (3) in conjunction with collaborative agencies/organizations, develop a plan and begin implementation of that plan.

c. Evaluate all activities and document lessons learned;

2. CDC Activities:

a. Collaborate with the recipient in all stages of the project and coordinate joint activities among all grantees;

b. Provide programmatic technical assistance as appropriate.

E. Application Content

Use the information in the Program Requirements, Other Requirements, and Evaluation Criteria sections to develop the application content. Your application will be evaluated on the criteria listed, so it is important to follow them in laying out your program plan. The narrative should be no more than 30 double-spaced typewritten pages, printed on one side, with one inch margins, and un-reduced font (10 or 12 point font only). Should graphics, maps overlays, etc. be used, they should be in black and white and meet the above criteria.

Include each of the following sections:

1. Description of Problem

Describe what is known of the asthma problem in the state or jurisdiction and efforts to date to begin to systematically address the problem;

2. Collaborative Relationships

Describe experiences with collaborative relationships around asthma or with other chronic or environmentally-related disease problems requiring extensive collaborative relationships both within and outside of the agency;

3. Program Purpose

Provide specific objectives for the proposed activity that are realistic, time-phased, measurable and reflect the three-year period of this solicitation. (Note that a statewide approach is encouraged; if a focus on only a part of the state's population is desired, that choice must be explained and justified.)

4. Management and staffing plan

Describe the qualifications and roles of a trained public health professional(s) to serve as asthma coordinator for the agency's program and develop asthma surveillance activities, and a supervisor who will assure support for the project staff. Include a plan to expedite filling of the staff position(s) and assure that they have been or will be approved by the applicant's personnel system. Where current staff already fill these roles and federal resources are not to be used for their support, information on the position and the qualifications of the person filling the position should be provided. Other support-level positions may also be proposed.

5. Program Plan

Submit a plan that describes how the project objectives will be achieved. Each objective should be clearly related to a specific objective in #3 above. The plan must address the following topics:

a. Describe the primary roles and responsibilities for the project staff over the three-year grant period, also specific staff activities that will contribute to meeting each objective;

b. Describe the organizational location of the proposed staff, their relation to the state's "asthma contact", and the support within the organizational structure for the activities defined for the project staff;

c. Describe existing or planned collaborative relationships and specifically define the approach to be used (particularly the role of the asthma coordinator) to establish/further develop these relationships. (Examples of collaborating groups: voluntary organizations; key medical care groups such as managed care organizations, major (particularly pediatric) urgent care facilities and hospitals; key city/county health agencies; and school groups; state level professional organizations. Demonstration of

partnerships with the clinical community is essential.) Letters of support from specific groups, including a statement of their intention to collaborate, will considerably strengthen the application. Note that grant funds should be used to leverage asthma program development in the state along with resources from other collaborative agencies and organizations.

d. Document assurance of ability of project staff to travel to Atlanta to participate in the National Asthma Conference and a pre-conference grantees meeting and willingness to share innovations, information, data, and materials.

6. Evaluation

Describe how progress made toward meeting objectives will be evaluated and documented.

7. Budget

Provide a detailed first year budget for the cooperative agreement with future annual projections if relevant. Include costs for key project staff to travel to Atlanta for four days each year.

F. Submission and Deadline

Application

Submit the original and two copies of PHS 5161-1 (OMB Number 0937-0189). Forms are in the application kit. On or before July 19, 1999, submit the application to the Grants Management Specialist identified in the "Where to Obtain Additional Information" section of this announcement.

Deadline: Applications shall be considered as meeting the deadline if they are either:

(1) received on or before the deadline date; or

(2) sent on or before the deadline date and received in time for orderly processing. (Applicants must request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late Applications: Applications which do not meet the criteria in (a) or (b) above are considered late applications, will not be considered, and will be returned to the applicant.

G. Evaluation Criteria

Each application will be evaluated individually against the following criteria by an objective review group appointed by CDC:

1. Description of the problem (20 Points)

The extent to which the agency's commitment to addressing asthma is demonstrated by accomplishments to date in understanding the problem;

2. Collaborative agreements (20 Points)

The appropriateness of organizations and agencies identified and their level of commitment as demonstrated by the content of the letters of support.

3. Measurable Objectives and Plan (25 Points)

The extent to which objectives are measurable with the stated purpose of the cooperative agreement, the extent to which the role of the asthma coordinator is defined and is appropriate in relation to the stated objectives; the ability to meet the objectives according to the specified time table, and the adequacy of the applicant's plan to carry out the proposed activities.

4. Management and Staffing Plan (20 Points)

The extent to which the role of proposed staff is defined and has identified adequate qualifications of and level of commitment for the proposed staff; and the level of organizational support available to the project staff.

5. Proposed Evaluation Plan (15 Points)

The adequacy of the applicant's plan to monitor progress toward meeting the objectives of the project.

6. Budget (Not Scored)

The extent to which the budget is reasonable, adequately justified, and consistent with the intended use of the cooperative agreement funds.

H. Other Requirements

Technical Reporting Requirements

Provide CDC with original plus two copies of—

1. Annual progress reports;

2. Financial status report, no more than 90 days after the end of the budget period; and

3. Final financial and performance reports, no more than 90 days after the end of the project period. Send all reports to the Grants Management Specialist identified in the "Where to Obtain Additional Information" section of this announcement.

The following additional requirements are applicable to this program. For a complete description of each, see Attachment I in the application package.

AR-7—Executive Order 12372 Review

AR-9—Paperwork Reduction Act Requirements

AR-10—Smoke-Free Workplace Requirements

AR-11—Healthy People 2000

AR-12—Lobbying Restrictions

I. Authority and Catalog of Federal Domestic Assistance Number

This program is authorized under section 301 and 317 of the Public Health Service Act, [42 U.S.C. section 241 and 247b], as amended. The Catalog of Federal Domestic Assistance number is 93.293.

J. Where To Obtain Additional Information

You may download Program Announcement 99109 and application forms from the CDC home page address on the Internet, <http://www.cdc.gov> (click on "Funding"). If you do not have Internet access, to receive additional written information and to request an application kit, call 1-888-GRANTS4 (1-888-472-6874). You will be asked to leave your name and address and be instructed to identify the announcement number of interest. If you have questions after reviewing the contents of the documents, business management technical assistance may be obtained from: Sharron P. Orum, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Announcement 99109, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Rd., Rm 3000, Atlanta, GA 30041 telephone 770-488-2716, Email address: spo2@cdc.gov.

For program technical assistance, contact: Leslie P. Boss, Air Pollution and Respiratory Health Branch, National Center for Environmental Health, Centers for Disease Control and Prevention, MS F-39, 4770 Buford Hwy, N.E., Atlanta, GA 30341-3724, 770-488-7329.

Dated: May 12, 1999.

John L. Williams,

*Director, Procurement and Grants Office
Centers for Disease Control and Prevention
(CDC).*

[FR Doc. 99-12441 Filed 5-17-99; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 99080]

Integration of HIV and Other Prevention Services Training Into Reproductive Health Settings; Notice of Availability of Funds

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 1999 funds for a cooperative agreement program for the training of reproductive health service providers in the integration of human immunodeficiency virus (HIV) and other prevention services into ongoing reproductive health services. This program will support national efforts to develop improved training strategies for reproductive health service providers to meet the challenge of delivering integrated reproductive health and HIV prevention services in reproductive health settings. This program addresses the "Healthy People 2000" priority areas of Family Planning, HIV Infection, and Tobacco.

Competitive cooperative agreements are announced for:

Core components: The focus will be on HIV prevention counseling and the integration of HIV prevention services into reproductive health services.

Optional components: To provide training and other integrated services technical assistance to reproductive health service providers in: (1) reproductive health and prevention services for underserved women (specifically to incarcerated, homeless, and substance-abusing women); (2) client satisfaction and the importance and impact it has on the provision of integrated reproductive health and prevention services; (3) teen pregnancy prevention efforts; and (4) efforts to reduce smoking during pregnancy.

CDC will establish cooperative agreements with one Regional Training Center (RTC) in each of the 10 Department of Health and Human Services (DHHS) Regional Offices. The RTCs will develop, conduct, and evaluate effective, consistent, and science-based training and other services integration interventions to reproductive health service providers, including but not limited to Title X family planning clinics, Community-Based Organizations (CBOs), Managed Care Organizations (MCOs), and State and local health departments.

Throughout this document, the term reproductive health service providers will encompass this spectrum of providers; the term training encompasses a wide spectrum of activities that may include traditional classroom training, one-on-one consultation, observations with feedback, distance-based learning (i.e., video and audioconferencing, computer-based learning systems, remote video instruction, self-instructional text modules, and train-the-trainer technology), etc.

B. Eligible Applicants

Assistance will be provided to non-profit organizations that are primarily training organizations. In addition, applicants must:

1. Demonstrate experience in offering training courses in the integration of HIV prevention with family planning for Title X grantees (as evidenced by (a) marketing materials promoting such training events and (b) a list of such trainings provided in the last year, including the name and location of training event).

2. Be located in the DHHS region in which training is to be provided (as evidenced by accompanying letterhead and contact information on all application forms).

3. Offer training to participants in all States within said DHHS region (as evidenced by marketing materials promoting training events throughout the region).

For an overview of previous CDC involvement in HIV prevention efforts in family planning settings, see Appendix I.

Note: Public Law 104-65 states that an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, cooperative agreement, contract, loan or any other form.

C. Availability of Funds

Approximately \$1.36 million is available in FY 1999 to fund approximately 10 awards. Only the 10 applicants funded for the Core Activity will be eligible for funding under the Optional Activity.

1. Approximately \$560,000 is available to fund one Regional Training Center in each of the 10 DHHS Regional Offices for Core Activities, with the average award being approximately \$56,000, which range from \$40,000 to \$80,000.

2. Approximately \$800,000 is available to fund Optional Activities. Separate applications must be submitted for each Optional Activity. The Optional Activities are:

(a) Underserved Populations. Approximately \$150,000 is available to fund approximately three awards. The average award will be approximately \$50,000, which range from \$30,000 to \$70,000.

(b) Client Satisfaction. Approximately \$150,000 is available to fund approximately three awards. The average award will be approximately \$50,000, which range from \$30,000 to \$70,000.

(c) Teen Pregnancy Prevention. Approximately \$250,000 is available to fund approximately four awards. The average award will be approximately \$62,500, which range from \$50,000 to \$80,000.

(d) Prenatal Smoking Cessation. Approximately \$250,000 is available to fund approximately four awards. The average award will be approximately \$62,500, which range from \$50,000 to \$80,000.

All applicants must apply for the Core Activity component and can address one or both of the Core Activity components: HIV Prevention Counseling and HIV Services Integration. Applicants are strongly encouraged to apply for one or more of the four Optional Activity components.

It is expected that the awards will begin on or about September 30, 1999, and will be made for a 12-month budget period within a project period of up to five years. Funding estimates may change.

Continuation awards within the approved project period will be made on the basis of satisfactory progress as evidenced by required reports and the availability of funds.

Funding Preference

Funding preference may be given to applicants that are also funded as RTCs by Office of Population Affairs.

D. Program Requirements

In conducting activities to achieve the purpose of this program, the recipient will be responsible for the activities under 1., (Recipient Activities), and CDC will be responsible for the activities listed under 2., (CDC Activities).

1. Recipient Activities

(a) Design a training intervention or carry out an existing training intervention to address the prevention needs of reproductive health service providers.

(b) Design and conduct an impact evaluation of the training intervention to assess the impact at the direct service level.

(c) Develop and carry out a program plan and training objectives:

(1) Identify the organization(s) to benefit from the intervention. In making the selection, consider annual training needs assessments, the level and willingness to participate and commit to the intervention on the part of a reproductive health services provider, and the level of available funding. Also consider other types of information that will assist in the development of program and training objectives, such as: types of health care providers and clinics; population served; geographic locations; substantive topics relevant to recent prevention or integrated reproductive health research findings; HIV/AIDS epidemiologic, demographic and behavioral data; sexually transmitted disease (STD) rates, unplanned pregnancy rates; teenage pregnancy or birthrates; substance abuse data; HIV prevention research findings; prenatal smoking cessation efforts; and level of other sources of prevention training in each region.

(2) Develop overall goals for the training intervention. Consider annual training needs assessments, previous experience in developing and conducting prevention or integrated reproductive health interventions, the specific needs of the selected reproductive health services provider, and the guidance of the Core Activities and Optional Activities as described in Section E., Application Content.

(3) Develop specific, time-phased, and measurable program objectives.

(4) Develop training objectives. These should be linked to the training needs assessment and relevant prevention or integrated reproductive health research findings, and should include behavioral, knowledge, and skills-based learning objectives. Each objective should be linked to an evaluation criteria.

(5) Develop training activities and programs to achieve objectives. Training can include workshops, in-service programs, conference co-sponsorship, short-term training institutes, and distance-based learning activities.

(d) Make available any training materials developed for prevention or integrated reproductive health training to other RTCs.

(e) In collaboration with the other RTCs, develop a strategy for sharing information related to the training intervention with other RTCs. A recommended training summary database is located in Appendix II.

2. CDC Activities

(a) Provide scientific consultation for development of training activities.

(b) Assist in developing evaluation strategies as needed.

(c) Coordinate dissemination of relevant findings from prevention or integrated reproductive health interventions to other training centers in a timely manner.

(d) Coordinate communication with other CDC programs as needed.

(e) Coordinate dissemination of evaluation findings from the prevention or integrated reproductive health interventions.

E. Application Content

Each applicant must apply for the Core Activity. Applications for the Core Activity can address one, or both, of the Core Activity components: HIV Prevention Counseling and HIV Service Integration. The application should clearly state which Core Activity components are being applied for. In this program announcement, the term intervention will refer to HIV prevention training or HIV services integration.

Core Activities

1. HIV Prevention Counseling. The design, delivery, evaluation, and dissemination of prevention counseling training for reproductive health service providers based on the translation of effective components of behavioral science. (See Appendix III for background information.)

2. HIV Service Integration. The design, delivery, and evaluation of management assessments, training, and other health management interventions for reproductive health service providers seeking to integrate STD/HIV, other prevention services, and family planning services into their service operations. (See Appendix IV for background information.)

Each applicant is encouraged to apply for one or more of the Optional Activity components. Only the applicants funded for Core Activity components are eligible to receive funding for Optional Activities.

Optional Activities

1. Underserved Populations. Activities to address the HIV and other prevention training needs of reproductive health service providers working with underserved populations. In particular, the HIV and other prevention training needs of reproductive health service providers working with: (1) substance-abusing women, (2) homeless women, and (3) incarcerated women. (See Appendix V for background information.)

2. Client Satisfaction. Activities designed to assess and demonstrate the

role of client satisfaction in planning and evaluating services offered by reproductive health programs. Applicants may consider a broad range of client satisfaction assessment methodologies addressing services management issues such as communications, quality of health services care, organization of health care delivery, patient access, physical plant infrastructure, and health care staff on-the-job satisfaction. (See Appendix VI for background information.)

3. Teen Pregnancy Prevention. Activities to disseminate information on teen pregnancy trends and issues and on best practices regarding teen pregnancy prevention; design training for reproductive health service providers on best practices regarding teen pregnancy prevention; explore ways to integrate specific teen pregnancy prevention interventions and comprehensive prevention strategies into ongoing community and health system-based programs that serve youth; and develop and carry out approaches to evaluate the effectiveness of the training and service integration strategies on system integration and service delivery. (See Appendix VII for background information.)

4. Prenatal Smoking Cessation. Activities to disseminate information on best practices in prenatal smoking cessation (PSC); design training for reproductive health services providers in carrying out best practice intervention(s) for PSC; explore ways to integrate a specified smoking during pregnancy intervention into ongoing reproductive health services, especially family planning and prenatal care services; and develop and carry out approaches to evaluate the effectiveness of the training and service integration strategies on system integration and service delivery. (See Appendix VIII for background information.)

Use the information in the Program Requirements, Other Requirements, and Evaluation Criteria sections to develop the application content. Each of the proposals for the Core and Optional Activities within your application will be evaluated independently on the criteria listed below; it is important to follow the criteria in laying out your program plan.

The narrative for the proposals should be no more than 15 double-spaced pages, printed on one side, with one-inch margins, and unreduced font, excluding appendixes and budgets. Applicants are to submit separate narratives and budgets for each Core Activity and each Optional Activity and each application must follow the order and structure below.

1. Background

(a) Describe the applicant's history and current health-related activities or projects.

(b) Describe the current status of the relevant training program and specific experiences as applicable to each proposed activity. Include a summary of prevention or integrated reproductive health training and other related services integration interventions conducted in the past year, including the name and location of the training events, the types of health professionals trained, any demographic data available about the trainees, the types of organizations trained, evaluation results, curricula and other training materials developed, and level and type of collaboration with other organizations in developing and delivering training.

2. Needs Assessment

(a) Include a copy of the latest related regional training needs assessment conducted by your organization, describe the process involved in conducting the needs assessment, and explain how the results will be used to plan, develop, or modify training activities and curricula for the project period.

(b) Describe the relevant problem (e.g., HIV, underserved women, teen pregnancy, pregnant women who smoke) among women in the region including the documented number of cases, and other data indicating behavioral risks for women such as STD rates, tobacco use, substance abuse data, rates of incarceration, information on homeless women, teen pregnancy, and unplanned pregnancy rates. Applicant should indicate the source(s) of data provided.

(c) Identify and describe the reproductive health service provider(s) for which the intervention is being proposed and why. Describe the demographics of the communities these agencies serve and a description of the services they provide. Indicate the source(s) of data provided. Include letters of support and intent to collaborate from the directors of the identified agencies.

(d) Describe the professional backgrounds and organizational affiliations of staff for which the intervention is being proposed and why. The applicant should describe the number of health care providers potentially eligible for the intervention and the degree of access these providers have to the populations at risk. Indicate the source(s) of data provided.

(e) Describe any anticipated obstacles to providing the intervention to the proposed organizations and personnel.

(f) Describe all current sources of funding for prevention or integrated reproductive health services training.

3. Goals and Objectives

(a) Provide realistic overall goals and objectives for each proposed activity. For the purposes of clarity and comparability, the term goal is defined as the proposed long-range benefits of the program for the selected population, defined in general terms. The goals should relate to the results of the needs assessment and to relevant prevention and integrated reproductive health services research.

(b) Provide specific, time-phased, and measurable objectives for the intervention, and describe activities planned to meet each objective. For the purposes of clarity and comparability, the term objective is defined as the anticipated results or outcomes of a program, representing changes in the knowledge, attitudes, and behaviors of the program's clients, described in measurable terms and indicating a specific period of time during which these results will be achieved.

Applicants should describe the time-phased objectives of the program and the activities intended to support these objectives. For each objective, note which of the goals it will support and how the objective's achievement will contribute to meeting the goal; and indicate how the applicant plans to measure its achievement.

(c) Provide long-term (five-year) program goals, including expected impact of the intervention on staff's prevention or integrated reproductive health knowledge, skills, and abilities and on service mix and implementation.

4. Training Plan

(a) Clearly describe the training plan for each proposed activity.

(b) For year one, provide proposed training course schedules, agendas, outlines, objectives for training, and estimated number of staff that will receive training.

5. Evaluation Plan

(a) Identify primary stakeholders in the evaluation process. (See Appendix IX for additional guidance related to evaluation.)

(b) Clearly identify the evaluation plan for each proposed activity.

(c) Describe the methodology for developing and implementing an evaluation plan and how the evaluation results will be used (what purpose they will serve). The applicant's evaluation plan should consist of two parts, as described below. For both parts, the applicant should describe how data will

be collected and analyzed. No less than three percent of total cooperative agreement funds applied for must support evaluation activities.

(1) The first part should include evaluation methods such as trainee satisfaction with the training and pre-test and post-test assessments of participants to determine staff skills and knowledge attained. The effectiveness of training content and training methodologies should also be evaluated to influence course format, content, and curriculum design. These activities should be incorporated as a routine part of the training activity.

(2) The second part should include a longer-term evaluation plan to assess at least one of the following: trainee's on-the-job behavioral skills change; change in trainee's workplace prevention or integrated reproductive health operations; improvement in quality of client care; and promotion and support for prevention or integrated reproductive health within the applicant's jurisdiction.

6. Program Staff

(a) Provide résumés and job descriptions of existing and newly proposed staff, identifying what each will provide, e.g., management and supervision, planning, curricula and course design, curricula and course delivery and evaluation, and staff support.

(b) Provide an organizational chart that identifies lines of authority including who will have management authority over the intervention.

7. Budget and Justification

Provide a detailed budget and line-item justification for all operating expenses that are consistent with the proposed program objectives and activities for each activity. Applicants should include:

(a) Any trainee travel costs that may be incurred.

(b) Cost for one annual trip for two staff persons to attend a planning, training, and information sharing meeting in Atlanta, Georgia (or another central location in the continental United States).

(c) A minimum of three percent of total budgeted funds to support evaluation activities.

F. Submission and Deadline

Submit the original and two copies of application form PHS 5161-1 (OMB Number 9037-0189). Forms are in the application kit. On or before July 6, 1999, submit the application to: Gladys Gissentanna, Grants Management Specialist, Grants Management Branch,

Procurement and Grants Office, Announcement 99080, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Road, Room 3000, Atlanta, Georgia 30341-4146.

Deadline: Applications shall be considered as meeting the deadline if they are either:

1. Received on or before the deadline date.
2. Sent on or before the deadline date and received prior to submission to the review panel. (Applicants must request a legibly dated United States Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or United States Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late Applications: Applications that do not meet the criteria in (1) or (2) above are considered late applications, will not be considered, and will be returned to the applicant.

G. Evaluation Criteria (Total 100 Points)

Each application will be evaluated independently against the criteria below by an independent review group appointed by CDC.

The Core Activity and each Optional Activity will be reviewed and scored independently. The total possible score for each individual activity is 100 points. Determination of the 10 RTCs will be made according to the top score based on rank order of the Core Activity, one award per DHHS Region. Funds for Optional Activities will only be awarded to the 10 selected RTCs.

1. Background (5 Points)

The extent to which the applicant demonstrates a) the ability to plan, develop, coordinate, deliver, and evaluate the proposed intervention; b) history of providing training to Title X family planning clinics; and c) history of providing region-wide training on this topic.

2. Needs Assessment (15 Points)

For each activity, the extent to which a) regional needs are considered in selecting proposed agencies and staff for intervention, b) need for the intervention is demonstrated, c) proposed agencies and staff identified for the intervention are relevant, appropriate, and accessible, and d) relevant prevention or integrated reproductive health research findings are incorporated into the needs assessment process.

3. Goals and Objectives (20 Points)

For each activity, the extent to which a) goals are realistic; b) objectives are

realistic, time-phased, and measurable and are linked to appropriate evaluation criteria; and c) the goals and objectives support the results of the needs assessment.

4. Training Plan (25 Points)

For each activity, the extent to which a) the process to identify training priorities appears appropriate and likely to promote and support the intervention, b) the training plan corresponds to identified needs, a reasonable number of the eligible trainee population is provided training, and c) assurance of training product dissemination is provided.

5. Evaluation Plan (20 Points)

The extent to which (a) methodologies for development and implementation of an evaluation plan are appropriate; (b) strategies for measuring program effectiveness, obtaining data, reporting results, and using the results for making programmatic decisions are feasible and result in useful information; and (c) no less than three percent of the funds requested support evaluation efforts.

6. Program Staff (15 Points)

The extent to which appropriate staff are identified (e.g. instructional specialists, evaluators, project managers, trainers, support staff, computer specialists, accountants) who have responsibility and authority for training activities, including expertise in various aspects of reproductive health, HIV education, counseling and testing, services integration, and behavior change counseling.

7. Budget and Justification (Not Scored)

The extent to which the applicant provides a detailed and clear budget and justification that is consistent with the proposed program objectives and activities.

H. Other Requirements

1. Technical Reporting Requirements

Provide CDC with an original and two copies of:

- (a) Semiannual Progress Report no later than 30 days after the end of the second and fourth quarters. The progress report must include: (1) a comparison of actual accomplishments to the goals established for the period; (2) the reasons for slippage if established goals were not met; and (3) other pertinent information including, when appropriate, analysis and explanation of unexpectedly high costs for performance.
- (b) Financial Status Report (FSR) no later than 90 days after the end of budget period.

(c) Final Financial Status Report and Performance Report no later than 90 days after the end of the project period.

Send all reports to: Gladys Gissentanna, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Announcement 99080, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Road, Room 3000, Atlanta, Georgia 30341-4146.

2. Additional Requirements

The following additional requirements are applicable to this program. For a complete description of each, see Attachment I in the application kit.

- AR-5 HIV Program Review Panel Requirements
- AR-7 Executive Order 12372 Review
- AR-8 Public Health System Reporting Requirements
- AR-10 Smoke-Free Workplace Requirements
- AR-11 Healthy People 2000
- AR-12 Lobbying Restrictions
- AR-15 Proof of Non-profit Status

I. Authority and Catalog of Federal Domestic Assistance Number

This program is authorized under Sections 301(a) and 317(k)(2) [42 U.S.C. 241(a) and 247b(k)(2)] of the Public Health Service Act, as amended.

J. Where To Obtain Additional Information

Please refer to Program Announcement 99080 when you request information. For a complete program description, information on application procedures, an application package, and business management technical assistance, contact: Gladys Gissentanna, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Announcement 99080, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Road, Room 3000, Atlanta, Georgia 30341-4146, Telephone: (770) 488-2753. E-mail address: gcg4@cdc.gov

Additional written information and application kits can also be requested by calling 1-888-GRANTS4 (1-888-472-6874). You will be asked to leave your name and address and will be asked to identify the program announcement of interest.

See also the CDC Internet web site (www.cdc.gov) and the Program and Grants Office web site for additional funding opportunities and electronic versions of all necessary forms (www.cdc.gov/od/pgo/forminfo.htm).

For program technical assistance, contact: Mary Kay Larson, Chief, Services Management and Research Team, Program Services and

Development Branch, Division of Reproductive Health, 4770 Buford Highway, NE, Mail Stop K-22, Atlanta, GA 30341-3717, Tel: (770) 488-5221, E-mail: mil2@cdc.gov.

Dated: May 12, 1999.

John L. Williams,

*Director, Procurement and Grants Office,
Centers for Disease Control and Prevention
(CDC).*

[FR Doc. 99-12440 Filed 5-17-99; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 99139]

Grants for Minority Health Statistics Dissertation Research Notice of Availability of Funds

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 99 funds for a dissertation research grants program for the Minority Health Statistics Grants Program of the National Center for Health Statistics (NCHS), CDC. This program addresses the Healthy People 2000" priority area, Surveillance and Data Systems.

The purpose of the Minority Health Statistics Grants Program is to make awards for (1) the conduct of special surveys or studies on the health of racial and ethnic populations or subpopulations; (2) analysis of data on ethnic and racial populations and subpopulations; and (3) research on improving methods for developing statistics on ethnic and racial populations and subpopulations.

B. Eligible Applicants

Eligible applicants may be public or private nonprofit institutions that will administer the grant on behalf of the proposed Principal Investigator (doctoral candidate). Examples of public and private nonprofit organizations include universities, colleges, research institutions, hospitals, and other public and private nonprofit organizations, State and local governments or their bona fide agents, and federally recognized Indian tribal governments, Indian tribes, or Indian tribal organizations.

The proposed Principal Investigator must be a registered doctoral candidate in resident or nonresident status. All requirements for the doctoral degree other than the dissertation must be

completed by the time of the award. Students seeking a doctorate in any relevant research discipline are eligible.

An applicant institution may be either the degree-granting institution or another non-profit institution with which the proposed Principal Investigator is professionally affiliated.

Note: Public Law 104-65 states that an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, cooperative agreement, contract, loan, or any other form.

C. Availability of Funds

Approximately \$150,000 is available in FY 1999 to fund approximately 5 awards. It is expected that the average award will be \$20,000 ranging from \$15,000 to \$30,000. It is expected that the awards will begin on or about September 30, 1999. The awards will be made for a 12-month budget period within a project period of up to 2 years. Funding estimates are subject to change.

D. Use of Funds

The total costs must not exceed \$30,000 for the entire project period. An application that exceeds this amount will be returned to the applicant. No supplemental funds will be awarded.

Funding support may only be requested for the amount of time necessary to complete the dissertation within the authorized project period.

Allowable costs include: the investigator's salary and direct project expenses such as travel, data processing, and supplies. Fees for maintaining matriculation or other fees imposed on those preparing dissertations are allowable costs, provided the fees are required of all students of similar standing, regardless of the source of funding. Applicants are expected to work full time on the project. Any level of effort that is less than full time must be fully justified.

Indirect costs under this grant program are limited to eight percent of direct costs, excluding tuition and related fees and expenditures for equipment. Indirect costs will be awarded at the actual indirect cost rate for the institution, if the rate is less than eight percent.

E. Funding Preference

Three factors influence the final funding decisions on applications for support of dissertations: (1) result of the initial review; (2) the potential of the applicant to contribute to the field; and (3) the availability of funds.

F. Program Requirements

Responsibility for the planning, direction, and execution of the proposed project will be solely that of the proposed Principal Investigator (the doctoral candidate).

1. The dissertation must examine and/or develop some aspect of statistical research on racial and ethnic populations or subpopulations. It should focus on one or more of the following research program areas: community-based research, methods and theory development, health promotion and data standards development, and data analysis and dissemination.

2. The dissertation must be officially accepted by the faculty committee or university official responsible for the candidate's dissertation and must be signed by the responsible officials.

3. Prior to submission of the application, the dissertation proposal must be approved by the dissertation faculty committee and certified by the faculty advisor. This information must be verified in a letter of certification from the chairperson and submitted with the grant application.

4. Applications from doctoral students who are women, members of minority groups, persons with disability, students of Historically Black Colleges and Universities, Hispanic Serving Institutions, and other predominately minority and minority serving institutions are encouraged.

5. The proposed investigator who receives support for dissertation research under a grant may not at the same time receive support under a predoctoral training grant or fellowship awarded by any other agency, or component, of the U.S. Department of Health and Human Services.

G. Application Content

Letter of Intent (LOI)

The LOI should identify program announcement number 99139, and the name of the principal investigator. The LOI does not influence review or funding decisions, but it will enable CDC to plan the review more efficiently. The LOI should be submitted on or before June 15, 1999, to the Grants Management Specialist identified in the "Where to Obtain Additional Information" section of this announcement.

Application

Use the information in the Program Requirements, Other Requirements, and Evaluation Criteria sections to develop the application content. Your application will be evaluated on the

criteria listed, so it is important to follow them in laying out your program plan. The narrative should be double-spaced, printed on one side, with one inch margins, and unreduced font. Applications will be eligible for support only during the review cycle for which they are submitted. No application can be submitted more than once even in revised form.

Applicants must follow the instructions in the research grant application PHS Form 398 in preparing the application with the following information/changes:

1. The Doctoral candidate should be identified as the Principal Investigator.
2. A questionnaire may be included as an appendix if it is essential to evaluate the proposal. A list of literature cited is required and may be included in the appendix. No other material should be provided in an appendix.
3. A letter from the faculty committee or the university official directly responsible for supervising the dissertation research must be submitted with the grant application. The letter must certify that (a) the committee has approved the formal proposal for the dissertation, (b) the grant application represents the dissertation proposal, and (c) the applicant will complete all requirements for the doctoral degree except the dissertation by the anticipated date of the grant award.
4. The application must identify all members of the faculty committee by listing the names on Form BB. A brief biographical sketch for each should be provided as explained in form 398, page FF.
5. Applicants should give human subjects protection and gender and minority representation by addressing the applicability and method of confidentiality and compliance.
6. The project description in the application must describe the scientific significance of the work, including its relationship to other current research, and the design of the project in sufficient detail to permit evaluation. It should also present and interpret progress to date if the research is already underway.
7. A detailed budget must be provided identifying the items for which funds are requested and their estimated costs. A budget justification explaining the necessity of these expenses for the research should also be included.
8. Statements of "Current and Pending Support" for both the student and the dissertation advisor must be identified on form GG.

H. Submission and Deadline

Letter of Intent (LOI)

On or before June 15, 1999, submit the LOI to the Grants Management Specialist identified in the "Where to Obtain Additional Information" section of this announcement.

Application

Submit the original and five copies of PHS-398 (OMB Number 0925-0001) (adhere to the instructions on the Errata Instruction Sheet for PHS 398). Forms are available at the following Internet address: www.cdc.gov/...Forms, or in the application kit. On or before July 15, 1999, submit the application to the Grants Management Specialist identified in the "Where to Obtain Additional Information" section of this announcement.

Deadline: Applications shall be considered as meeting the deadline if they are either: (a) Received on or before the deadline date; or (b) Sent on or before the deadline date and received in time for orderly processing. (Applicants must request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late Applications: Applications which do not meet the criteria in (a) or (b) above are considered late applications, will not be considered, and will be returned to the applicant.

I. Evaluation Criteria

Proposals are judged on the basis of their scientific merit, the theoretical importance of the research question and the appropriateness of the proposed data and methodology to be used in addressing the question.

Each application will be evaluated individually against the following criteria by an objective review panel appointed by CDC.

1. Significance and originality of the research.
2. Knowledge of research relevant to the topic.
3. Appropriateness of methods and data, including a description and justification of the analytic techniques that will be employed and a discussion of the methodological problems that might be encountered.
4. Availability and adequacy of data.
5. Organization of the project.
6. Adequacy of facilities and resources.
7. Human subjects involvement and protection (when appropriate).
8. Representation of women and minorities (when appropriate).

9. Appropriateness of the budget.

In evaluating applications and making recommendations reviewers assess the applicant's potential for making significant contributions to the field of minority health statistics research.

J. Other Requirements

Technical Reporting Requirements

The dissertation constitutes the final report of the grant. Three copies of the dissertation shall be submitted to the CDC.

Provide CDC with original plus two copies of—

1. The annual progress reports, no more than 30 days after the end of the budget period;
2. The financial status report, no more than 90 days after the end of the budget period; and
3. The final financial status and performance reports, no more than 90 days after the end of the project period.

Send all reports to the Grants Management Specialist identified in the "Where to Obtain Additional Information" section of this announcement.

The following additional requirements are applicable to this program. For a complete description of each, see Attachment I. included in the application kit.

- AR-1 Human Subjects Requirements
- AR-2 Requirements for Inclusion of Women and Racial and Ethnic Minorities in Research
- AR-4 HIV/AIDS Confidentiality Provisions
- AR-9 Paperwork Reduction Act Requirements
- AR-10 Smoke-Free Workplace Requirements
- AR-11 Healthy People 2000
- AR-12 Lobbying Restrictions

K. Authority and Catalog of Federal Domestic Assistance Number

This program is authorized under section 306(m) of the Public Health Service Act [42 U.S.C. section 242k(m)], as amended. The Catalog of Federal Domestic Assistance number is 93.283.

L. Where To Obtain Additional Information

You can download a copy of this program announcement and the PHS Form 398 from the CDC home page Internet site: <http://www.cdc.gov> double click on "funding".

To receive additional written information call 1-888-GRANTS4 (1-888-472-6874). You will be asked to leave your name, address, and phone number and will need to refer to Program Announcement 99131. You

will receive a complete program description, information on application procedures, and application forms. CDC will not send application kits by facsimile or express mail.

Please Refer To Announcement number 99139 When Requesting Information and Submitting an Application.

If you have questions after reviewing the contents of all the documents, business management technical assistance may be obtained by contacting: Victoria Sepe, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Announcement 99139, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Road, Room 3000, Atlanta, GA 30341, telephone (770) 488-2721, Email address: vxw1@cdc.gov

For program technical assistance, contact: Audrey L. Burwell, M.S., Minority Health Statistics Grants, Program Director, National Center for Health Statistics, CDC, 6525 Belcrest Road, Room 1100, Hyattsville, MD 20782, Telephone: (301) 436-7062, extension 127, Email: azb2@CDC.GOV, Program Website: www.cdc.gov/nchswww/about/grants/grants.htm

Dated: May 12, 1999.

John L. Williams,

Director, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99-12439 Filed 5-17-99; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 99064]

Racial and Ethnic Approaches to Community Health 2010; (REACH 2010) Demonstration Projects; Notice of Availability of Funds

The President has committed the nation to an ambitious goal by the year 2010 to eliminate disparities in health status experienced by racial and ethnic minority populations in key areas while continuing the progress we have achieved in improving the overall health of the American people. In support of this effort, the Department of Health and Human Services identified six priority areas in which racial and ethnic minorities experience serious health disparities: Infant Mortality, Deficits in Breast and Cervical Cancer Screening and Management, Cardiovascular Diseases, Diabetes,

Human Immunodeficiency Virus(HIV)Infections/Acquired Immunodeficiency Syndrome(AIDS), and Deficits in Child and/or Adult Immunizations. On behalf of the DHHS-wide collaborative effort, the Centers for Disease Control and Prevention (CDC) will coordinate and manage a major component of activities to support this initiative; this component is composed of community based demonstration projects to address the six identified priority areas of health disparities.

CDC is committed to achieving the health promotion and disease prevention objectives of the Department of Health and Human Services' Initiative to Eliminate Racial and Ethnic Health Disparities, Healthy People 2000, a nationwide strategy to reduce morbidity and mortality and improve the quality of life. This announcement relates to the Healthy People 2000 focus areas of Maternal and Infant Health, Diabetes and Chronic Disabling Conditions, Heart Disease and Stroke, HIV Infection, Cancer, and Immunization and Infectious Diseases.

A. Purpose

CDC announces the availability of fiscal year (FY) 1999 funds for a cooperative agreement program for organizations serving racial and ethnic minority populations at increased risk for infant mortality, diabetes, cardiovascular diseases, HIV infection/AIDS, deficits in breast and cervical cancer screening and management, or deficits in child and/or adult immunization rates.

Note: There will be a video-conference Pre-Application Workshop on Friday, May 28, 1999. For more information, contact Letitia Presley-Cantrell at (770) 488-5426 or E-mail ccinfo@cdc.gov

The Racial and Ethnic Approaches to Community Health 2010 (REACH 2010) Demonstration Projects are two-phase projects whose purpose is for communities to mobilize and organize their resources in support of effective and sustainable programs which will eliminate the health disparities of racial and ethnic minorities. These demonstrations require but are not limited to collaboration of experts in developing and managing health promotion programs and experts in conducting health-related research. Such collaboration is needed in order to identify and/or develop successful community-based disease prevention and health promotion models that can be replicated for the ultimate goal of eliminating health disparities among racial and ethnic minorities.

The REACH 2010 Demonstration Projects will examine science-based

community level interventions which could be effective in eliminating health disparities, with the goal of replicating their successes in other communities.

Phase I is a 12-month planning Phase to organize and prepare infrastructure for Phase II. Cooperative agreements in Phase I will support the planning and development of demonstration programs using a collaborative multi-agency and community participation model. Phase I may also include the development of baseline measures for assessing the outcomes of the projects. Upon completion of Phase I, grantees will have utilized appropriate data and developed a Community Action Plan (CAP) designed to reduce the level of disparity within the selected communities in one or more of the six priority areas of infant mortality, diabetes, cardiovascular diseases, HIV infection/AIDS, deficits in breast and cervical cancer screening and management, or deficits in child and/or adult immunization rates. Please note that applications addressing related priority areas (e.g. diabetes and cardiovascular diseases, HIV infection/AIDS and infant mortality) will be considered.

Phase II is the implementation of a demonstration project of specified interventions for specified priority area(s), for a well defined minority population. Phase II also involves appropriate evaluations of interventions and outcomes of the project.

B. Eligible Applicants

Applications may be submitted by public and private nonprofit organizations and by governments and their agencies; that is, universities, colleges, research institutions, hospitals, other public and private nonprofit organizations, State and local governments or their bona fide agents, federally recognized Indian tribal governments as well as non-federally recognized tribes and other organizations that qualify under the Indian Civil Rights Act, State Charter Tribes, Urban Indian Health Programs, Indian Health Boards, and Inter-Tribal Councils.

Minimal Requirements

1. Proposal

The Applicant must target one or more specific racial or ethnic minority communities that is African American, American Indian or Alaska Native, Hispanic American, Asian American, or Pacific Islander. Communities or groups which cannot be specified under these categories will not be considered.

2. Lead organization (CCO)

The applicant must be the lead organization, or Central Coordinating Organization (CCO), for a community coalition to focus on minority health concerns. The applicant must have at least two years of such relevant experience within the past four years. The CCO must have direct fiduciary responsibility over the administration and management of the project. All applicants must include proof of collaborative relationships with at least three (3) other organizations (see requirements for Coalition Membership below) as evidenced by a detailed (delineating responsibilities and budgetary support) and signed Memoranda of Agreements (or other official documentation) among the participants. The rationale for selection of the lead organization should be included.

3. Coalition Membership

Coalitions (including the CCO) must have at a minimum a community-based organization and three other organizations, of which at least one must be either:

- a. local or state health department, or
- b. university of research organization.

The applicant must be able to show strong representation by the minority community in the coalition.

4. Tax-exempt status

For those applicants applying as a private, nonprofit organization, proof of tax-exempt status must be provided with the application. Tax-exempt status is determined by the Internal Revenue Service (IRS) Code, Section 501(c)(3). Any of the following is acceptable evidence:

- a. A reference to the organization's listing in the IRS's most recent list of tax-exempt organizations described in section 501(c)(3) of the IRS Code.
- b. A copy of a currently valid IRS tax-exemption certificate.
- c. A statement from a state taxing body, State Attorney General, or other appropriate state official certifying that the applicant organization has a nonprofit status and that none of the net earnings accrue to any private shareholders or individuals.
- d. A certified copy of the organization's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the organization.

Note: Public Law 104-65 states that an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 that engages in lobbying activities is not eligible to receive Federal funds constituting an

award, grant, cooperative agreement, contract, loan, or any other form.

C. Availability of Funds

In FY 1999, CDC expects to provide approximately \$9,400,000 for funding approximately 30 Phase I cooperative agreements. It is expected that the average award will be \$250,000, with awards ranging from \$200,000 to \$300,000. It is expected that the awards will begin on or about September 30, 1999 and will be made for a 12 month budget period.

Only applicants selected for Phase I will be eligible to compete for additional funds to implement and evaluate the demonstration program of Phase II. Phase I recipients which successfully compete for Phase II awards may anticipate an additional four years of funding (for a total project period of five (5) years for Phase I and Phase II). Funding estimates, and continuation of awards, may change based on the availability of funds.

Approximately \$30 million may be available to fund approximately 15-20 Phase II cooperative agreements. Criteria for selection of Phase II grantees are:

1. Extent to which Phase I requirements were met.
2. Appropriate definition of the level of health disparity among the target population and the extent of the disparity.
3. Potential for proposed interventions to affect the priority area(s).
4. Extent of inclusion of community participants and partners. Awardee will specifically be evaluated on their ability to recruit and maintain appropriate community and public/private collaborators.
5. The potential for community action plans to assure sustainability of the effort.
6. The potential for the community action plans to leverage additional public and/or private resources to support the overall prevention effort.
7. The appropriateness and thoroughness of the evaluation process to assess the impact and effectiveness of the project intervention in the community.
8. The appropriateness and thoroughness of the data collection infrastructure that is planned for and developed for the demonstration project.

Should additional funding become available in the future, grantees funded under Phase I, but not funded for Phase II, will receive preference for funding.

Use of Funds

Under this program announcement, funds may not be used for research

involving human subjects until Institutional Review Board (IRB) approval is obtained. Funds may be restricted until appropriate IRB clearances and procedures are in place.

Funds may be used for priority areas only. However, this does not restrict the applicant from documenting the association of underlying causes and relationship to priority areas.

Funds may not be used to support direct patient medical care, or facilities construction in Phase I or Phase II, or to supplant or duplicate existing funding.

Although applicants may contract with other organizations under these cooperative agreements, applicants must perform a substantial portion of the activities (including program management and operations) for which funds are requested.

Funding Preferences

Geographic distribution among communities across the United States, diversity in priority areas, and racial/ethnic diversity will be funding considerations.

Each applicant may submit only one application, and our intent is to fund one award per community; therefore, applicants from the same geographic area are encouraged to collaborate. Applicants must describe the geographic boundaries and make-up of the area for which it is applying. A community will not be eligible for multiple awards for different priority areas. However, applications addressing related priority areas (e.g. diabetes and cardiovascular diseases, HIV infection/AIDS and infant mortality) will be considered.

D. Program Requirements

In conducting activities to achieve the purposes of this program, the recipient will be responsible for the activities under 1. Recipient Activities, and CDC will be responsible for the activities under 2. CDC Activities:

1. Recipient Activities—Phase I

a. Enhance community coalition by identifying all appropriate additional partners, including community-based organizations, academic, foundations, State and local health agencies, Indian Health Boards, NRMOS, etc., from which to strengthen the community's overall ability to eliminate the health disparities of the target population, and to demonstrate the changes in health disparities. The applicant must be able to show strong representation by the targeted minority community in the coalition.

b. Establish community working groups to address critical program

issues, and enhance local partnerships to strengthen the overall commitment of the community. Establish linkages with national and state partners (governmental and non-governmental) and other interested organizations.

c. Coordinate and use relevant data and community input to assess the extent of the problem in the selected program priority areas (infant mortality, diabetes, cardiovascular diseases, HIV infection/AIDS, deficits in breast and cervical cancer screening and management, or deficits in child and/or adult immunization rates).

d. Select intervention strategies which have the most promising potential for reducing the health disparities of the target population. Develop a Community Action Plan reflecting the intervention strategies, and other activities proposed for Phase II.

e. Identify data sources and establish outcome and process evaluation measures to be reviewed at the completion of Phase I. (Examples of possible performance measures are provided in the Addendum).

Collaborate with CDC, academic partners or other appropriate organizations, to determine an appropriate evaluation of the program and to identify promising intervention strategies for Phase II.

f. Participate in up to 3 CDC sponsored workshops for technical assistance, planning, evaluation and other essential programmatic issues.

Phase II:

a. Implement the community action plan addressing the selected priority area(s) for the target population. Initiate actions to assure the interventions are administered effectively, appropriately and in a timely manner.

b. Collect appropriate data to monitor and evaluate the program including process and outcome measures.

c. Maintain linkages and collaborations with local partners, and develop new linkages with state and national partners.

d. Collaborate with academic or other appropriate institutions in the analysis and interpretation of the data.

e. Establish mechanisms with other public and/or private groups to maintain financial support for the program at the conclusion of federal support.

f. Participate in conferences and workshops to inform and educate others regarding the experiences and lessons learned from the project, and collaborate with appropriate partners to publish the results of the project to the public health community.

2. CDC Activities

a. Provide consultation and technical assistance in the planning and evaluation of program activities.

b. Provide up-to-date scientific information on the basic epidemiology of the priority area(s), recommendations on promising intervention strategies, and other pertinent data and information needs for the specified priority area(s) including prevention measures and program strategies.

c. Assist in the analysis of data and evaluation of program progress.

d. Assist recipients in collaborating with State and local health departments, community planning groups, foundations and other funding institutions, and other potential partners.

e. Foster the transfer of successful prevention interventions and program models through convening meetings of grantees, workshops, conferences, and communications with project officers.

E. Application Content

Each applicant may submit only one application. Applicants should use the information in the Program Requirements, Other Requirements, and Evaluation Criteria sections to develop the application content. Applications will be evaluated on the criteria listed, so it is important to follow them in laying out the program plan. In developing this plan, applicants must describe a community-based program within at least one of the six following priority areas: (1) Infant mortality, (2) diabetes, (3) cardiovascular diseases, (4) HIV infection/AIDS, (5) deficits in breast and cervical cancer screening and management, or (6) deficits in child and/or adult immunizations, that specifically focus on a geographically defined racial or ethnic minority community that is African American, American Indian, Alaska Native, Hispanic American, Asian American, or Pacific Islander.

The narrative should be no more than 30 double-spaced pages, printed on one side, with one inch margins, and 12 point font. The thirty pages does not include budget, appended pages, or items placed in appended pages (resumes, agency descriptions, etc.). The narrative should include:

1. One Page Abstract

Describe:

a. the Central Coordinating Organization (type of organization and relevant experience);

b. membership in the coalition (types of organizations as specified in "Eligible Applicants" Section;

c. target racial/ethnic minority population(s) to be served; and
d. health priority area(s) to be addressed.

2. Introduction

A brief summary of which geographically defined racial or ethnic group or groups the applicant will target, the population size of both the ethnic or racial group(s) and total population of the catchment area of the applicant and its partners, the geographic boundaries in which the applicant will operate (append a legible map to the application) and the priority area(s) chosen for the proposal. The enclosed Addendum includes a table that provides sample sizes that could be needed to demonstrate a statistically significant intervention effect. Based on this table, it has been calculated that a minimum of 3000 persons with the disease or health priority condition per community will be necessary to find statistically significant results. Since many of the communities may have considerably smaller sample sizes, for the purpose of this announcement, a target population size of 3000 is desirable but not mandatory. Applicants are encouraged to include as large a population as possible in order to find statistically significant results once an intervention is selected.

3. Community Need and Priority Area(s)

A description of the specific community's health problem and need for the priority area(s) for which the applicant will address. Any data in support of the priority area(s) and which defines the degree of disparity in terms of mortality or morbidity (or other measures appropriate to the priority area(s)). All sources of data and information must be referenced.

4. Organizational Summary (CCO and Coalition Members)

A brief organizational summary of the CCO including mission statement, history of incorporation, and experience in community-based work. Relevant supporting documents (including resumes and job descriptions of participating staff) should be appended to the application, but should not be included in this summary.

A brief history of the CCO's experience in operating and centrally administering a coordinated public health or related program serving the proposed and geographically defined racial or ethnic minority populations (including program data collection and interventions for one or more of the six (6) priority areas). Applicant must have at least two years of such relevant

experience within the past four years. Applicants should describe the extent to which racial and ethnic minorities are represented on governing boards and in key leadership positions. Applicants should provide descriptions of two years of other collaborative ventures within the past four years and document: (a) the accomplishments of those collaborative ventures, and (b) the characteristics that led to the accomplishments. Applicant must describe nature of coalition and members of coalition by type of organization and relevant organizational experience. The applicant must be able to show strong representation by the targeted minority community in the coalition. Signed Memoranda of Agreement (or other official documentation) of the relevant collaboration should be appended to the document, but not included in this section of the narrative. Tribal resolution(s) or letter(s) of support from tribal chair(s) or president(s) should be appended to this section of the document for those applicants applying as tribes.

5. History and experience in working with ethnic/racial groups

Succinctly describe your experience working directly with the target population for at least two years in the selected communities during the past four years. Applicants should also explain their current relationship with the target population. Any other related experience in which the applicant was involved but not the lead organization, but which is specific to the target population should also be included. Letters of support, awards, newspaper articles, evaluation reports, and other forms of recognition which validate statements and past efforts should be appended to the application.

6. Community Action Plan

A description of plans for developing and organizing the planning effort, to include who is or should partner in the effort, how community participation will be obtained, how the applicant anticipates enhancing the sustainability of the effort, including improving linkages with collaborators and other organizations to leverage more resources (such as foundations, health departments, and other potentially influential and beneficial groups), how the applicant will collect data and information to track progress towards project goals of decreasing disparities. Letters of support from agencies, institutions, and other potential collaborators as well as any examples of

previous planning documents should be appended to the application.

7. Evaluation Plan

A description of the evaluation and monitoring process that the applicant will use to track and measure progress in Phase I. The evaluation plan should include time-specific objectives which account for the major activities of the community action plan, the means of tracking and measuring the collaborative work with coalition partners, and any other relevant process measures. Time lines, objectives, and other supporting documentation should be included in the appendix for this section.

8. Budget

Provide a line-item budget with a detailed, narrative justification that is consistent with the purpose and objectives of this cooperative agreement.

9. Human Subjects

Adequately address the requirements of Title 45 CFR Part 46 for the protection of human subjects.

F. Submission and Deadline

Letter of Intent (LOI) Organizations intending to apply are encouraged to submit a non-binding letter of intent to the address below. Your letter of intent should include the following information:

1. Identify the project by name and announcement number 99064.
2. Identify the geographic location, health priority area(s), and racial/ethnic group which the application will address.
3. Identify Central Coordinating Organization (CCO) and Coalition Members.

This process will enable CDC to plan more efficiently for the processing and review of the applications.

Please submit the letter of intent to the address below on or before June 1, 1999.

Send the letter to: Adrienne S. Brown, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Announcement 99064, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Road, Room 3000, Atlanta, Georgia 30341-4146,

or

E-mail: asm1@cdc.gov

Application: Submit the original and five copies of PHS-398 (OMB Number 0925-0001) (adhere to the instructions on the Errata Instruction Sheet for PHS 398). Forms are in the application kit. Submit the application on or before June 30, 1999, to the business management contact listed in Section J., "Where to Obtain Additional Information."

Deadline: Applications shall be considered as meeting the deadline if they are either:

(a) Received on or before the deadline date; or

(b) Sent on or before the deadline with a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.

Late Applications: Applications which do not meet the criteria in (a) or (b) above are considered late applications, will not be considered, and will be returned to the applicant.

G. Evaluation Criteria (100 points)

Each application will be evaluated individually against the following criteria by an independent review group appointed by CDC.

1. Background on Community and Priority Area(s): (25 Points)

a. The extent to which the applicant clearly defines the racial/ethnic group(s), geographic community, and priority area(s) to be addressed.

b. The extent to which the applicant uses data if such data are available and other supporting evidence to document the disparities within the group, and the appropriateness of the target population sizes (see addendum) for the priority area(s) selected. The enclosed Addendum includes a table that provides sample sizes that could be needed to demonstrate a statistically significant intervention effect. Based on this table, it has been calculated that a minimum of 3000 persons with the disease or health priority condition per community will be necessary to find statistically significant results. Since many of the communities may have considerably smaller sample sizes, for the purpose of this announcement, a target population size of 3000 is desirable but not mandatory. Applicants are encouraged to include as large a population as possible in order to find statistically significant results once an intervention is selected.

c. The degree of the disparity between the target population and the general population based on local data wherever available, or from State or national level

data which directly supports the basis for the health disparity in the priority area(s) selected.

2. Organizational Summary: (20 Points)

a. Extent to which applicant describes the history, nature, and extent of its relevant experience in organizing community activities and details at least two years of relevant experience within that past four years with supporting documentation.

b. Extent to which the applicant describes existing facilities and staff (including resumes and job descriptions) to accomplish the desired outcomes of Phase I.

c. The adequacy of proposed staffing and collaborations with partners, particularly to meet the design and evaluation needs of the project. Include the nature of coalition and members of coalition by type of organization and relevant organizational experience. The applicant must show strong representation by the minority community in the coalition.

3. History and Experience in working on public health programs with Ethnic/Racial Groups: (25 Points)

a. Extent to which the applicant documents its experience and successes in operating and centrally administering a coordinated public health or related program serving the target population for at least two years (within the past four years) for the selected priority area(s) (including appended letters of support).

b. Extent of experience in other public health programs, and public health research or related data collection.

4. Community Action Plan (CAP): (20 Points)

Extent to which the applicant demonstrates a thorough and reasonable plan for the development of their CAP, including the assurance of community participation and participation of coalition members in the planning of the CAP.

5. Evaluation plan: (10 points)

a. Extent to which the applicant presents a reasonable and thorough evaluation plan for Phase I.

b. Appropriateness of evaluation methods, goals, objectives, and time lines to the development of the community action plan and the overall planning effort, and identification of data and information sources needed to track progress toward the project's objectives.

6. Budget (Not Scored)

Extent to which a line-item budget is presented, justified, and is consistent

with the purposes and objectives of the cooperative agreement.

7. Human Subjects (Not Scored)

Does the application include a plan to adequately address the requirements of Title 45 CFR Part 46 for the protection of human subjects?

H. Other Requirements

Technical Reporting Requirements— Provide CDC with original plus two copies of

1. progress reports semiannually;
2. financial status report, no more than 90 days after the end of the budget period; and

3. final financial status and performance reports, no more than 90 days after the end of the project period.

Send all reports to the business management contact listed in Section J, "Where to Obtain Additional Information."

The following additional requirements are applicable to this program. For a complete description of each, see Attachment I in the application kit.

AR-1 Human Subjects Requirements

AR-2 Requirements for Inclusion of Women and Racial and Ethnic Minorities in Research

AR-4 HIV/AIDS Confidentiality Provisions

AR-5 HIV Program Review Panel Requirements

AR-7 Executive Order 12372 Review

AR-8 Public Health System Reporting Requirements

AR-9 Paperwork Reduction Act Requirements

AR-10 Smoke-Free Workplace Requirements

AR-11 Healthy People 2000

AR-12 Lobbying Restrictions

AR-14 Accounting System

Requirements

AR-15 Proof of Non-Profit Status

I. Authority and Catalog of Federal Domestic Assistance (CFDA) Number

This program is authorized under sections 301(a) and 317(k)(2) of the Public Health Service Act [42 U.S.C. 241(a) and 247b(k)(2)], as amended. The Catalog of Federal Domestic Assistance number is 93.945.

J. Where To Obtain Additional Information

To receive additional written information and to request an application kit, call 1-888-GRANTS4 (1-888-472-6874). You will be asked to leave your name and address and will be instructed to identify the Program Announcement Number 99064.

If you have questions after reviewing the contents of all the documents, business management technical assistance may be obtained from: Adrienne S. Brown, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Announcement 99064, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Road, Room 3000, Atlanta, GA 30341-4146, Telephone: (770) 488-2755, E-mail: asm1@cdc.gov

For this and other CDC announcements, see the CDC home page on the Internet: <http://www.cdc.gov>

For program technical assistance, contact: Letitia Presley-Cantrell, Centers for Disease Control and Prevention (CDC), National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), 4770 Buford Hwy, NE, Mailstop K-30, Atlanta, Georgia 30341, Telephone: (770) 488-5426, E-mail: ccdinfo@cdc.gov

Dated: May 12, 1999.

Henry S. Cassell,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99-12532 Filed 5-17-99; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 99115]

Cooperative Agreements for Strategies To Prevent Genital Herpes Infections: Building A National Prevention Program, Notice of Availability of Funds

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 1999 funds for a cooperative agreement program for prevention research on genital herpes simplex virus (HSV) infections. This program addresses the "Healthy People 2000" priority area Sexually Transmitted Diseases. The purpose of the program is to stimulate and support projects that will address existing gaps in our knowledge about the psycho social and economic burden of HSV and strategies to prevent transmission of genital herpes simplex infections in the United States in the context of new diagnostic technologies and new therapeutic strategies.

This program has four general objectives: (1) to assess behavioral and psycho social impact and indirect and

intangible costs of genital herpes infections; (2) to assess acceptability of screening for genital HSV using type-specific tests likely to soon become commercially available for clinical use; (3) to determine correlates of infectivity among asymptomatic and symptomatic infected persons; and (4) to assess relative risks of HSV transmission from asymptomatic and symptomatic infected persons to sex partners.

B. Eligible Applicants

Applications may be submitted by public and private nonprofit organizations and by governments and their agencies; that is, universities, colleges, research institutions, hospitals, other public and private nonprofit organizations, State and local governments or their bona fide agents, and federally recognized Indian tribal governments, Indian tribes, or Indian tribal organizations.

Note: Public Law 104-65 states that an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, cooperative agreement, contract, loan, or any other form.

C. Availability of Funds

Approximately \$790,000 is available in FY 1999 to fund two to three projects. It is expected that the average award will be \$350,000, ranging from \$250,000 to \$500,000. It is expected that the awards will begin on or about September 30, 1999 and will be made for a 12-month budget period within a project period of up to three years. Funding estimates may change. Continuation awards within an approved project period will be made on the basis of satisfactory progress as evidenced by required reports and the availability of funds.

Funding Preference

Preference will be given to applicants with access to subjects attending a wide variety of clinical service delivery settings in addition to traditional public STD clinics such as managed care organizations, family planning clinics, and community-based clinics. Preference will also be given to proposals that address all four study questions.

D. Study Questions

Applicants must address at least three of the following:

1. What is the behavioral and psycho social burden of diagnoses of genital HSV infection on asymptomatic and symptomatic infected persons and their sex partners? What are the indirect and

intangible costs of a diagnosis of genital HSV infection on asymptomatic and symptomatic infected persons and their sex partners?

There is programmatic interest in determining the impact of a genital HSV diagnosis on the ability to recognize genital lesions and symptoms, frequency of sex when lesions/symptoms are present, notification of sex partners, consistent and correct condom use, health care seeking behaviors, adherence to counseling messages, willingness to take medication and compliance with treatment regimens, work status, general psycho social status, interpersonal relationships, perceived stigma, partners' willingness to be tested, partners' willingness to change sexual behaviors, and partners' willingness to take postexposure prophylaxis. Preference will be given to proposals that (1) compare outcomes for asymptomatic persons with those of symptomatic persons and (2) compare these outcomes to those of persons with symptomatic and asymptomatic curable STDs such as gonorrhea and chlamydia. Comparisons with other sexually active persons not known to be infected with HSV are also encouraged. A prospective design may be used for newly diagnosed persons, and a cross-sectional design used for other infected persons.

There is programmatic interest in developing, implementing, and evaluating methods to assign costs to psycho social burden, pain, and suffering ("intangible costs") and economic costs related to lost work or productivity or job choice ("indirect costs") and to changes in personal relationships associated with a diagnosis of genital HSV infection in asymptomatic and symptomatic persons with newly diagnosed infection, persons with infections diagnosed more than one year prior to interview, and their sex partners. Preference will be given to proposals that (1) use more than one method to assign costs to psycho social burden, such as willingness-to-pay, quality of life, or other methods; (2) compare outcomes for asymptomatic persons with those of symptomatic persons; (3) compare outcomes to those of persons with symptomatic and asymptomatic curable STDs such as gonorrhea.

2. What is the acceptability of screening tests to identify persons infected with genital HSV?

There is programmatic interest in assessing acceptability of one or more new type-specific serologic tests for genital HSV infection in asymptomatic and symptomatic infected persons, including reasons why tests are

accepted or refused, predictors of sero positivity, and predictors of receiving test results. Assessment of acceptability of rapid "point-of-service" tests (whereby results are available to the client during a visit to a health care provider) with other tests is strongly encouraged. Applicants are encouraged to involve State Public Health Department Laboratories in the performance of serologic tests that are not point-of-service.

3. What are the correlates of infectivity among asymptomatic men and women?

There is programmatic interest in determining correlates of infectivity in asymptomatic persons who test positive on new type-specific serologic tests for HSV infection, using viral culture, PCR for HSV DNA, or other appropriate methods to determine viral shedding including quantitative methods, in conjunction with assessment of sero status of current sex partners. Determining relative frequency of viral shedding from various anatomic sites in men (including penis, foreskin, and scrotum) in a small sample of infected men is strongly encouraged. Viral cultures and PCR should be performed by a reference laboratory with a record of high performance.

4. What are the relative and absolute risks of transmission to sex partners from asymptomatic infected persons, persons with symptoms not recognized as HSV, and symptomatic persons?

There is programmatic interest in comparison of risk factors for transmission of HSV from asymptomatic and symptomatic infected persons, with respect to sexual practices, frequency of intercourse when symptoms are present, duration of diagnosed genital herpes, consistent and correct condom use, number of partners with genital herpes, length of relationships with infected partners, age at diagnosis of genital herpes, severity of symptomatic first episodes, frequency of recurrences, and HSV-1 infection. A prospective or cross-sectional design may be used. Identification of likely source contacts of newly diagnosed persons is desirable. Consideration will be given to analyses of existing databases.

E. Program Requirements

In conducting activities to achieve the purpose of this program, the recipient will be responsible for the activities under 1. Recipient Activities and CDC will be responsible for conducting activities under 2. CDC Activities:

1. Recipient Activities

a. Design and conduct a study to address the chosen study questions listed in

Programmatic Interests. Recipients must address at least 3 of the four study questions.

- b. Evaluate and analyze data.
 - c. Disseminate study findings through presentations at scientific meetings and publication in peer-reviewed journals.
2. CDC Activities
- a. Provide up-to-date scientific information and technical assistance and advice in the design and conduct of the research
 - b. Assist in the development of a research protocol for IRB review by all cooperating institutions participating in the research project. The CDC IRB will review and approve the protocol initially and on at least an annual basis until the research project is completed.
 - c. Monitor and evaluate scientific and operational accomplishments of the project through periodic site visits, telephone calls, and interim data analyses.
 - d. Assist, as needed, in the analysis and interpretation of data.
 - e. Assist in the dissemination of finding to the public health community for use in prevention programs.

F. Application Content

Follow the PHS-398 (Rev. 5/95) application and Errata sheet, and include the following information. Applicants must document access to men, persons of color, and young adults (e.g., age 18-24) to address existing gaps in knowledge about HSV transmission.

1. Summarize current knowledge of transmission and burden of genital herpes infections among asymptomatic and symptomatic infected persons and their sex partners in the United States and the potential role of new type-specific serologic tests for HSV likely to become commercially available. Describe how activities evaluated in this project can be implemented into public health practice.

2. Specific, measurable, and time-framed objectives.

3. A detailed plan describing the methods by which the objectives will be achieved and evaluated, including their sequence. Describe the extent to which the selected study sites and study populations will enable the results from this research to be generalizable to other settings or populations likely to be screened or at risk for genital HSV infection, including clinical service delivery settings in addition to traditional public STD clinics such as managed care organizations, family planning clinics, and community-based clinics.

4. Describe procedures to disseminate the study findings through presentation and publication.

5. Describe the principal investigator's role and responsibilities.

6. Describe qualifications of proposed staff and their previous experience and achievements in genital herpes research,

health services research, health economics, behavioral and social sciences, epidemiology and biostatistics, and laboratory sciences as appropriate for the proposed project. For each member of the research team, include their title, qualifications, experience, percentage of time each will devote to the project, as well as that portion of their salary to be paid by the cooperative agreement, and identify specific assigned responsibilities.

7. Describe the nature and extent of collaboration with State and local health departments or research institutions and CDC during various phases of the project. Provide in an appendix, letters of support from all key participating organizations which clearly indicate their commitment to participate as described in the operational plan. Collaboration with experts and organizations that have expertise in genital herpes education, counseling, and advocacy is encouraged.

8. Describe proposed procedures for adequate protection of human subjects. Describe how women and racial and ethnic minorities are appropriately represented in the proposed research.

9. Provide a line-item budget and an accompanying detailed line-by-line justification that demonstrates the request is consistent with the purpose and goals of this program. Include a detailed first year's budget for the cooperative agreement with future annual projections, if relevant.

G. Submission and Deadline

Letter of Intent (LOI)

A letter of intent to apply is requested but not required from potential applicants. Your letter of intent should include the following information: announcement number 99115; name and address of institution; name, address, and telephone number of contact person; and specific objectives to be addressed by the proposed project. The letter of intent must be postmarked on or before June 25, 1999, to: Sharron Orum, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Announcement 99115, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Rd., Room 3000, Atlanta, GA 30341.

Application

Applicants should follow the PHS-398 (Rev. 4/97) and Errata sheet. Forms are in the application kit. On or before July 25, 1999, submit the application to: Sharron Orum, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office,

Announcement 99115, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Rd., Room 3000, Atlanta, GA 30341.

Deadline: Applications shall be considered as meeting the deadline if they are either received on or before the deadline date or sent on or before the deadline date and received in time for orderly processing. (Applicants must request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.) Applications that do not meet these criteria are considered late applications, will not be considered, and will be returned to the applicant.

H. Evaluation Criteria

Applications that are complete and responsive may be subjected to a preliminary evaluation (triage) to determine if the application is of sufficient technical and scientific merit to warrant further review; CDC will withdraw from further consideration applications judged to be noncompetitive and promptly notify the principal investigator or program director and the official signing for the applicant organization. Those applications judged to be competitive will be further evaluated by a dual review process. Awards will be made based on priority score by Peer Review, programmatic priorities and needs as determined by a secondary review panel, and the availability of funds.

1. The first review will be a peer review of all applications. Evaluation factors will be:

a. The background of the proposal, e.g., the basis for the present proposal, a critical evaluation of existing knowledge, and the specific knowledge gaps that the applicant intends to fill.

b. The specific aims of the research project, i.e., the objectives and the hypothesis to be tested.

c. The originality of the proposed research from a scientific or technical standpoint, including the adequacy of the theoretical and conceptual framework.

d. The adequacy of the proposed research design, approaches, and methodology to carry out the research, including quality assurance procedures and plans for data management and statistical analyses, and evaluation.

e. The extent to which the study population included men, racial and ethnic minorities, and young adults, i.e., age 18-24.

f. The extent to which the research findings are likely to lead to new policies and recommendations by advisory groups or feasible, cost-effective interventions.

g. Qualifications, adequacy, and appropriateness of the interdisciplinary

research team to accomplish proposed activities. The extent to which the research team includes expertise in genital herpes research, behavioral and social sciences, health services research, health economics, epidemiology, biostatistics, and laboratory sciences as appropriate for the proposed project.

h. The degree of commitment and cooperation of proposed collaborators and participating organizations, as evidenced by letters detailing the nature and extent of the involvement.

i. Capacity to carry out the project, including adequacy of existing and proposed facilities and resources.

j. Inclusion of Women and Racial and Ethnic Minorities in Research: The degree to which the applicant has met the CDC Policy requirements regarding the inclusion of women, ethnic, and racial groups in the proposed research. This includes:

(1) The proposed plan for the inclusion of both sexes and racial and ethnic minority populations for appropriate representation.

(2) The proposed justification when representation is limited or absent.

(3) A statement as to whether the design of the study is adequate to measure differences when warranted.

(4) A statement as to whether the plans for recruitment and outreach for study participants include the process of establishing partnerships with communities and recognition of mutual benefits.

k. Human subjects: The extent to which the application adequately addresses the requirements of Title 45 CFR Part 46 for the protection of human subjects.

1. The reasonableness of the proposed budget to the proposed research.

2. The second review will be conducted by a secondary review committee of Senior Federal officials. The factors to be considered will include:

- The results of the peer review.
- Geographic distribution.
- The overall match between the proposal and the program interests.
- Overall balance among the four major areas of interest: (1) the behavioral and psycho social impact and indirect and intangible costs of genital herpes infections; (2) acceptability of screening for genital HSV; (3) correlates of infectivity among asymptomatic and symptomatic infected persons; and (4) relative risk of HSV transmission from asymptomatic and symptomatic infected persons to sex partners.

e. Budgetary considerations.

I. Other Requirements

Technical Reporting Requirements

Provide CDC with original plus two copies of

- Progress reports semiannually;
 - Financial status report, no more than 90 days after the end of the budget period; and
 - Final financial status and performance reports, no more than 90 days after the end of the project period.
- Send all reports to the Grants Management Specialists identified in

the "Where to Obtain Additional Information" section of this announcement.

The following additional requirements are applicable to this program. For a complete description of each, see Attachment I in the application kit.

AR-1 Human Subjects Requirements

AR-2 Requirements for Inclusion of Women and Racial and Ethnic Minorities in Research

AR-7—Executive Order 12372 Review

AR-9—Paperwork Reduction Act

AR-10—Smoke-Free Workplace

Requirements

AR-11—Healthy People 2000

AR-12—Lobbying Restrictions

J. Authority and Catalog of Federal Domestic Assistance Number

This program is authorized under section 318 of the Public Health Service Act, [42 U.S.C. 247c], as amended. The Catalog of Federal Domestic Assistance number is 93.978.

K. Where To Obtain Additional Information

This and other CDC announcements may be downloaded from the CDC Internet home page—<http://www.cdc.gov>. Click on "funding."

To receive additional written information and to request an application kit, call 1-888-GRANTS4 (1-888-472-6874). You will be asked to leave your name and address and will be instructed to identify the Announcement number of interest.

If you have questions after reviewing the contents of all the documents, business management technical assistance may be obtained from: Sharron Orum, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Announcement 99115, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Road, Room 3000, Atlanta, Georgia 30341, Telephone (770)488-2716, E-mail address: spo2@cdc.gov

For program technical assistance, contact: Katherine Stone, Division of STD Prevention, Centers for Disease Control and Prevention (CDC), Mail Stop E-02, 1600 Clifton Road, Atlanta, Georgia 30333, Telephone (404) 639-8183; FAX (404) 639-8610, E-mail address: kms1@cdc.gov

Dated: May 12, 1999.

John L. Williams,

Director, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 99-12438 Filed 5-17-99; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 99N-1220]

Draft Civil Money Penalty Reduction Policy for Small Entities

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing a draft civil money penalty reduction policy for small entities as required by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) and the Presidential Memorandum of April 21, 1995. This draft policy is being issued for public comment only and will not be implemented until a final policy is published in the **Federal Register**.

DATES: Written comments on the draft policy may be submitted by August 16, 1999.

ADDRESSES: Submit written comments on the draft policy to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Comments should be identified with the docket number found in brackets in the heading of this document. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft policy.

FOR FURTHER INFORMATION CONTACT: Jeffrey B. Governale, Division of Compliance Policy (HFC-230), Office of Regulatory Affairs, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-0411, FAX 301-827-0482.

SUPPLEMENTARY INFORMATION:

I. Background

The Food and Drug Administration (FDA) is issuing a draft civil money penalty (CMP) reduction policy for small entities (draft penalty reduction policy) as mandated by SBREFA (Pub. L. 104-121) and the Presidential Memorandum of April 21, 1995 (60 FR 20621, April 26, 1995).

SBREFA was enacted on March 29, 1996, and seeks to improve the regulatory climate for small entities by, among other things, requiring agencies to establish small entity penalty reduction policies as follows:

Sec. 223—Rights of Small Entities in Enforcement Actions

(a) In General—Each agency regulating the activities of small entities shall establish a policy * * * to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a

small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small businesses.

(b) Conditions and Exclusions—Subject to the requirements or limitations of other statutes, policies or programs established in this section shall contain conditions or exclusions which may include, but not be limited to—

(1) requiring the small entity to correct the violation within a reasonable correction period;

(2) limiting the applicability to violations discovered through participation by the small entity in a compliance assistance or audit program operated or supported by the agency or a State;

(3) excluding small entities that have been subject to multiple enforcement actions by the agency;

(4) excluding violations involving willful or criminal conduct;

(5) excluding violations that pose serious health, safety or environmental threats; and

(6) requiring a good faith effort to comply with the law.

A statement entered into the Congressional Record (142 Congressional Record S3242, daily ed. March 29, 1996) after enactment of SBREFA explains that agencies have "flexibility to tailor their specific programs to their missions and charters" and instructs agencies "to develop the boundaries of their program and the specific circumstances for providing for a waiver or reduction of penalties" (id. at S3244). To that end, SBREFA specifies that a penalty reduction policy adopted by an agency may be subject to the requirements or limitations of other applicable statutes. SBREFA also lists six possible exclusions or conditions (see section 223 of SBREFA as quoted previously in this document) that an agency may incorporate in its policy.

This draft penalty reduction policy also complies with the Presidential Memorandum of April 21, 1995, which directs agencies to implement the policy of waiving penalties as follows:

1. *Authority to Waive Penalties.* (a) To the extent permitted by law, each agency shall use its discretion to modify the penalties for small businesses in the following situations. Agencies shall exercise their enforcement discretion to waive the imposition of all or a portion of a penalty when the violation is corrected within a time period appropriate to the violation in question. For those violations that may take longer to correct than the period set by the agency, the agency shall use its enforcement discretion to waive up to 100 percent of the financial penalties if the amounts waived are used to bring the entity into compliance. The provisions in paragraph 1(a) of this memorandum shall apply only where there has been a good faith effort to comply with applicable regulations and the violation does not involve criminal wrongdoing or significant threat to health, safety, or the environment.

FDA has reviewed: (1) The Federal statutes it enforces which authorize CMP's, (2) its current practices used to assess CMP's on small entities, and (3) the appropriate conditions and exclusions for a penalty reduction policy for small entities that violate the law. On the basis of that review, FDA announces its draft penalty reduction policy for small entities. FDA invites comments on this draft policy.

FDA currently enforces the following amendments to the Federal Food, Drug, and Cosmetic Act (21 U.S.C.) and the Public Health Service Act (42 U.S.C.), which authorize CMP's under the referenced sections:

Radiation Control for Health and Safety Act of 1968 (21 U.S.C. 360pp),
Safe Medical Devices Act of 1990 (21 U.S.C. 333(f)),

Mammography Quality Standards Act of 1992 (42 U.S.C. 263b(h)),

National Childhood Vaccine Injury Act of 1986 (42 U.S.C. 262(d)(2) and 42 U.S.C. 300aa-28),

Prescription Drug Marketing Act of 1988 (21 U.S.C. 333(b)),

Generic Drug Enforcement Act of 1992 (21 U.S.C. 335b), and

Food Quality Protection Act of 1996 (21 U.S.C. 333(f)).

II. Draft Civil Money Penalty Reduction Policy for Small Entities

The FDA's draft policy with respect to reducing or waiving civil money penalties (CMP's) against a small entity is: FDA will consider on a case-by-case basis whether to reduce or waive CMP's against a small entity. In determining whether to reduce or waive CMP's against a specific small entity, the following considerations will apply:

A. Except as provided in paragraph C below, penalty reduction or waiver will not be available for any small entity if:

1. The small entity was subject to an enforcement action (e.g. seizure, injunction or prosecution) by FDA within the last 5 years, and is still under the same management;

2. Any of the small entity's violations involved willful conduct;

3. The small entity does not make a good faith effort to comply with the law; or

4. Any of the small entity's violations pose serious health or safety threats.

B. In considering whether FDA will reduce or waive a CMP, FDA may consider:

1. The egregiousness of the violations;

2. The isolated or repeated nature of the violations;

3. The small entity's history (if any) of violations;

4. The amount of harm caused by the violations;

5. The degree to which a CMP will deter the small entity or others from committing future violations;

6. The extent to which the small entity cooperated during the investigation;

7. Whether the small entity corrected the violations within a reasonable time period;

8. Whether the small entity has engaged in subsequent significant remedial efforts to mitigate the effects of the violations and to prevent future violations;

9. Whether the small entity voluntarily reported the violations to FDA promptly after discovering them; and

10. The small entity's efforts to determine and meet its legal obligations.

C. FDA may also consider whether to reduce or waive a CMP against a small entity, including a small entity otherwise excluded from this draft policy under paragraph A above, if the small entity can demonstrate to the FDA's satisfaction that it is financially unable to pay the penalty, immediately or over a reasonable period of time, in whole or in part.

D. If a small entity corrects the violative conditions within a reasonable time period, FDA may reduce the amount of any CMP that may be imposed for the violations, up to the amount spent by the small entity for corrective action. FDA may take into account the time in which the small entity took corrective action and any difficulties the small entity encountered when doing so.

Penalties Eligible for Reduction

The draft penalty reduction policy will apply to judicial and administrative CMP's.

Exclusions From the Draft Penalty Reduction Policy

The draft penalty reduction policy shall not apply to any remedy that may be sought by FDA other than CMP's.

SBREFA also permits an agency to apply penalty reduction to violations discovered through a small entity's participation in a compliance assistance or audit program operated or supported by the agency or state. Although various units within FDA provide regulatory guidance to small entities, FDA does not operate a formal compliance assistance or audit program. Because FDA does not have a compliance program of the type described in SBREFA, this condition is not included in the draft penalty reduction policy.

Both SBREFA and the Presidential Memorandum exclude violations that pose serious environmental threats from the penalty reduction policy. Because FDA's enforcement efforts generally focus on actions that affect the public health and safety, but not the environment, the condition is not included in the draft penalty reduction policy. If a small entity is eligible for CMP reduction, but has obtained an economic benefit from the violations such that it may have obtained an economic advantage over its competitors, FDA may seek the full amount of the penalty. FDA retains this discretion to ensure that small entities that comply with public health laws enforced by the agency are not disadvantaged by those who have not complied.

FDA has determined that all CMP's assessed under the authority of the Generic Drug Enforcement Act (GDEA) should be excluded from the draft penalty reduction policy. Under GDEA, CMP's may be assessed for a variety of intentional or "knowing" conduct related to abbreviated new drug applications (21 U.S.C. 335b(a)). Also, GDEA permits CMP's for debarred individuals who provide services in any capacity to persons who have approved or pending drug product applications (id). Because of the level of scientist required to assess a CMP under GDEA, FDA believes it is not appropriate to consider reduction or waiver of penalties in such cases.

The National Childhood Vaccine Injury Act (NCVIA) also has a provision for CMP, for which intentional or knowing conduct is a requirement for assessment of penalties. Section 2128(b) of the Public Health Service Act (42 U.S.C. 300aa-28) states that a CMP may be assessed when a vaccine manufacturer intentionally destroys, alters, falsifies, or conceals records associated with the manufacture of vaccines. Accordingly, FDA believes it is not appropriate to consider reduction or waiver of CMP in cases involving this provision of the NCVIA.

Definition of "Small Entity"

Section 211(1) of SBREFA defines the term "small entity" as having the same meaning as in section 601 of the United States Code (5 U.S.C. 601). Section 601 defines "small entity" as "small business," "small organization" and "small governmental jurisdiction."

Under section 601(3) of 5 U.S.C., a "small business" has the same meaning as "small business concern" under section 3 of the Small Business Act (15 U.S.C. 632(a)), unless an agency, after consultation with the Office of Advocacy of the Small Business

Administration (SBA) and after opportunity for public comment, establishes its own definition.

Section 632(a)(1) of 15 U.S.C. defines a "small business concern" as an enterprise "which is independently owned and operated and which is not dominant in its field of operation" (15 U.S.C. 632(a)(1)). The SBA has further defined "small business concern" for a number of specific industries based on the sizes of the enterprises and their affiliations (see 13 CFR part 121 and the SBA Table of Size Standards).

When SBA determines whether an enterprise is a small business, it generally counts the enterprise's affiliations (see 13 CFR 121.103). Family enterprises or enterprises in which the same individual or individuals have a controlling interest are aggregated for this purpose. If the aggregate total of the affiliated enterprises exceeds the size requirement for small businesses, none of the affiliated enterprises is considered a small business.

Federal law defines "small organization" as a not-for-profit enterprise which is independently owned and operated and not dominant in its field (5 U.S.C. 601(4)). The U.S. Code defines a "small governmental jurisdiction" as a governmental entity with a population of less than 50,000 (5 U.S.C. 601(5)). The definitions of "small organization" and "small governmental jurisdiction" may be changed by agencies after an opportunity for public comment. The small business definitions within the nutritional food labeling exemptions (21 CFR 101.9(j) and 101.36(h)) are not applicable to CMP's.

III. Regulatory Requirements

FDA is announcing a draft penalty reduction policy as required by SBREFA. As a general statement of policy, the Administrative Procedure Act does not require that FDA publish this draft policy for notice and comment. However, under the Good Guidance Practices published in the **Federal Register** of February 27, 1997 (62 FR 8961), FDA is providing interested parties, particularly small entities, with an opportunity to comment on the draft penalty reduction policy. This draft policy is being issued for public comment only and will not be implemented until a final policy is published in the **Federal Register**.

This guidance document represents the agency's current thinking on the draft CMP reduction policy for small entities. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the

requirements of the applicable statute, regulations, or both.

IV. Request for Comments

Interested persons may, on or before August 16, 1999, submit to the Dockets Management Branch (address above) written comments on the document entitled "Draft Civil Money Penalty Reduction Policy for Small Entities." Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Although all received comments will be considered by FDA in formulating the final penalty reduction policy, the agency is not obligated to respond to each comment. The agency will make changes to the draft penalty reduction policy, as appropriate. Copies of the draft policy and received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

V. Electronic Access

A copy of the draft policy may also be downloaded to a personal computer with access to the World Wide Web (WWW). The Office of Regulatory Affairs (ORA) home page includes the draft policy and may be accessed at "http://www.fda.gov/ora". The draft policy will be available under "Compliance References."

Dated: May 11, 1999.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 99-12390 Filed 5-17-99; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98E-0789]

Determination of Regulatory Review Period for Purposes of Patent Extension; Lotemax™ and Alrex™

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for Lotemax™ and Alrex™ and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and

Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Written comments and petitions should be directed to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Brian J. Malkin, Office of Health Affairs (HFY-20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-6620.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product Lotemax™ and Alrex™ (loteprednol etabonate). Lotemax™ is indicated for the treatment of steroid responsive inflammatory conditions of the palpebral and bulbar conjunctiva, cornea and anterior segment of the globe such as allergic conjunctivitis, acne rosacea, superficial punctate keratitis, herpes zoster keratitis, iritis, cyclitis, selective infective conjunctivides, when the inherent hazard of steroid use is accepted to

obtain an advisable diminution in edema and inflammation. Alrex™ is indicated for the temporary relief of the signs and symptoms of seasonal allergic conjunctivitis. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for Lotemax™ and Alrex™ (U.S. Patent No. 4,996,335) from Nicholas S. Bodor, and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated December 16, 1998, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of Lotemax™ and Alrex™ represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for Lotemax™ and Alrex™ is 3,092 days. Of this time, 2,017 days occurred during the testing phase of the regulatory review period, while 1,075 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355) became effective:* September 22, 1989. The applicant claims January 2, 1989, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was September 22, 1989, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the act:* March 31, 1995. The applicant claims March 29, 1995, as the date the new drug application (NDA) for Lotemax™ and Alrex™ (NDA 20-583) was initially submitted. However, FDA records indicate that NDA 20-583 was submitted on March 31, 1995.

3. *The date the application was approved:* March 9, 1998. FDA has verified the applicant's claim that NDA 20-583 was approved on March 9, 1998.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,284 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may,

on or before July 19, 1999, submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interested person may petition FDA, on or before November 15, 1999, for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41-42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: May 4, 1999.

Thomas J. McGinnis,
Deputy Associate Commissioner for Health Affairs.

[FR Doc. 99-12392 Filed 5-17-99; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Subcommittee of the Biological Response Modifiers Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Subcommittee of the Biological Response Modifiers Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 3, 1999, 8:30 a.m. to 6 p.m., and June 4, 1999, 8 a.m. to 3 p.m.

Location: Holiday Inn, Versailles Ballrooms I and II, 8120 Wisconsin Ave., Bethesda, MD.

Contact Person: Gail M. Dapolito or Rosanna L. Harvey, Center for Biologics Evaluation and Research (HFM-71),

Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301-827-0314, or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area), code 12389. Please call the Information Line for up-to-date information on this meeting.

Agenda: On June 3 and 4, 1999, the Xenotransplantation Subcommittee will discuss the following public health issues concerning porcine xenotransplantation: (1) Update of scientific data concerning porcine endogenous retrovirus, (2) update of patient monitoring and screening data concerning patients who have received a porcine xenograft, (3) update on FDA xenotransplantation policy development, and (4) proposals for solid organ xenotransplantation.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by May 27, 1999. Oral presentations from the public will be scheduled between approximately 8:45 a.m. to 9:15 a.m. and 5:30 p.m. to 6 p.m. on June 3, 1999. Time allotted for each presentation may be limited. Those desiring to make formal oral

presentations should notify the contact person before May 20, 1999, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 12, 1999.

Michael A. Friedman,

Deputy Commissioner for Operations.

[FR Doc. 99-12519 Filed 5-13-99; 4:24 pm]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

FDA 225-99-4000]

Memorandum of Understanding Between the Food and Drug Administration and the U.S. Army Medical Research and Material Command

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between FDA and the U.S. Army Medical Research and Material Command. The purpose of the MOU is to define responsibilities during the research, development, and pre-marketing acquisition of medical material for military applications.

DATES: The agreement became effective November 16, 1998.

FOR FURTHER INFORMATION CONTACT: Steven M. Solomon, Office of Regulatory Affairs (HFC-240), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-0386.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108 (c), which states that all written agreements and MOU's between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: May 11, 1999.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

BILLING CODE 4160-01-F

225-99-4000

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE U.S. ARMY MEDICAL RESEARCH AND MATERIEL COMMAND
AND
THE FOOD AND DRUG ADMINISTRATION

SUBJECT: Quality Assurance Support for Medical Materiel Having Military Application

1. Purpose. This Memorandum of Understanding (MOU) formalizes the relationship and defines the responsibilities of the U.S. Army Medical Research and Materiel Command (USAMRMC) and the Food and Drug Administration (FDA) to each other during the research, development, and pre-marketing acquisition of medical materiel for military application.

2. Background. The USAMRMC mission of research, development, testing, and evaluation of medical materiel for military application, to include drugs, biological products, protective cosmetics, and medical devices, requires significant interface with contractors to assure a reliable, safe product. The FDA mission of regulation, inspection, and oversight to insure that quality products are provided presents a unique opportunity for the FDA to assist USAMRMC in developing quality medical materiel.

3. Scope. The MOU is limited to quality assurance support by the FDA for USAMRMC Advanced Development (6.4) and Engineering Development (6.5). Medical materiel, for the purpose of this MOU, includes drugs, biological products, protective cosmetics, and medical devices.

4. Responsibilities.

a. The U.S. Army Medical Research and Materiel Command will:

(1) Involve the FDA at the earliest practicable stages of materiel development.

(2) Provide the FDA with an annual five year projected milestone schedule of developmental items.

(3) Seek FDA advice regarding contractor suitability prior to awarding contracts for development of prototypes and pre-production products under consideration for Department of Defense (DOD) application.

(4) Seek FDA advice in the review of draft product specifications and other documents to help identify and resolve at the earliest possible time potential regulatory and/or quality assurance issues.

(5) Retain final authority in selection of contractors for materiel development contracts.

(6) Provide advance notice when naming FDA as the Government Accepting Authority for materiel under a USAMRMC contract.

b. The Food and Drug Administration will:

(1) Upon request, provide pre-award evaluations of prospective contractors for prototype development and preproduction product contracts.

(2) Upon request, provide review of draft product specifications and other documents.

(3) Upon request, act as the Government Accepting Authority for USAMRMC medical materiel contracts. This will include signatory authority for Materiel Inspection and Receiving Reports (DD Form 250). The FDA reserves the right to not act as the accepting authority when the FDA has not had the opportunity to provide a pre-award evaluation prior to award of the contract, or when USAMRMC's choice of contractor has been evaluated by FDA and found not acceptable.

(4) Use the applicable requirements of the Federal Food, Drug, and Cosmetic Act, as amended, and regulations promulgated thereunder as the quality standard for determining contractor and product acceptability. Other requirements deemed essential, due to the military uniqueness of an acquisition, will be specified by USAMRMC.

(5) Determine the amount and nature of work it will perform to fulfill its responsibilities under this MOU.

5. Administration.

a. This agreement will become effective upon final signature and will remain in effect for six (6) years.

b. The agreement will be reviewed every two (2) years on the last signature anniversary date, to ensure adequacy and currency;

however, it may be amended by mutual consent at any time.

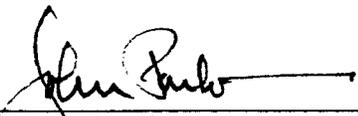
c. The agreement may be unilaterally terminated by providing the other party with 180 days written notice of intent.

d. Resources required to support this MOU, to include travel and per diem costs, will be provided by the performing party.

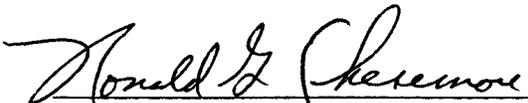
e. Points of contact.

(1) USAMRMC - Mailing Address: U.S. Army Medical Research and Materiel Command, ATTN: MCMR-RCQ, 504 Scott Street, Ft. Detrick, MD 21702-5012. Telephone: 301-619-2165.

(2) FDA - Mailing Address: U.S. Food and Drug Administration, Medical Products Quality Assurance Staff (HFC-240) 12720 Twinbrook Parkway, Suite 400, Rockville, MD 20857. Telephone: 301-827-0390, ATTN: Director, Medical Products Quality Assurance Staff.



John Parker
Major General, MC
Commanding
U.S. Army Medical Research and
Materiel Command



RONALD G. CHESEMORE
Associate Commissioner for
Regulatory Affairs
Food and Drug Administration

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel.

Date: May 19, 1999.

Time: 1 pm to 2:30 pm.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: William C. Branche, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4182, MSC 7808, Bethesda, MD 20892, (301) 435-1148.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.

Date: May 20, 1999.

Time: 10:00 am to 11:30 am.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: William C. Branche, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4182, MSC 7808, Bethesda, MD 20892, (301) 435-1148.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS).

Dated: May 11, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99-12430 Filed 5-17-99; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Special Emphasis Panel, May 17, 1999, 8 a.m. to May 18, 1999 5 p.m., Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, MD, 20814 which was published in the **Federal Register** on April 29, 1999, 64 FR 23088.

The meeting will be held on June 23, 8 a.m.-June 24, 1999, 5 p.m., at the Holiday Inn-Gaithersburg, 2 Montgomery Village Avenue, Gaithersburg, MD, 20879. The meeting is closed to the public.

Dated: May 11, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99-12424 Filed 5-17-99; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, Small Grants Program for Behavioral Research in Cancer Control.

Date: June 15, 1999.

Time: 8:30 am to 5 pm.

Agenda: To review and evaluate grant applications.

Place: Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Wilna A. Woods, Deputy Chief, Special Review, Referral and Research Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, Rockville, MD 20852, (301) 496-7903.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: May 11, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99-12425 Filed 5-17-99; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, Novel Technologies for Non-Invasive Detection, Diagnosis, and Treatment of Cancer (Section 2—Hardware).

Date: June 21-22, 1999.

Time: 8 am to 5 pm.

Agenda: To review and evaluate contract proposals.

Place: Holiday Inn, 2 Montgomery Village Avenue, Gaithersburg, MD 20879.

Contact Person: C.M. Kerwin, Scientific Review Administrator, Special Review, Referral and Resources Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6130 Executive Boulevard/EPN-630, 301/496-7421.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: May 11, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99-12426 Filed 5-17-99; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group, Subcommittee G—Education.

Date: June 21–23, 1999.

Time: 10 am to 5 pm.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn—Georgetown, 2101 Wisconsin Avenue, NW, Washington, DC 20007.

Contact Person: Harvey Stein, Scientific Review Administrator, Grants Review Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, 6130 Executive Boulevard, Rockville, MD 20892, 301-496-7481.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: May 11, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99-12427 Filed 5-17-99; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in section 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Iron Overload and Hereditary Hemochromatosis Study—Field Center(s).

Date: June 7, 1999.

Time: 7 p.m. to 10 p.m.

Agenda: To review and evaluate contract proposals.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Diane M. Reid, Scientific Review Administrator, NIH, NHLBI, DEA, Two Rockledge Center, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892-7924, (301) 435-0277.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Iron Overload and Hereditary Hemochromatosis Study—Central Laboratory.

Date: June 8, 1999.

Time: 8 a.m. to 11 a.m.

Agenda: To review and evaluate contract proposals.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Diane M. Reid, Scientific Review Administrator, NIH, NHLBI, DEA, Two Rockledge Center, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892-7924, (301) 435-0277.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Iron Overload and Hereditary Hemochromatosis Study—Coordinating Center.

Date: June 8, 1999.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate contract proposals.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Diane M. Reid, Scientific Review Administrator, NIH, NHLBI, DEA, Two Rockledge Center, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892-7924, (301) 435-0277.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Mentored Patient-Oriented Research Career Development Award and Midcareer Investigator Award in Patient-Oriented Research.

Date: June 9–10, 1999.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Diane M. Reid, Scientific Review Administrator, NIH, NHLBI, DEA, Two Rockledge Center, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892-7924, (301) 435-0277.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Disease and Resources Research, National Institutes of Health, HHS)

Dated: May 11, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99-12428 Filed 5-17-99; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Phenotypic Characterization of Sleep in Mice.

Date: June 7–8, 1999.

Time: 6 pm to 10 am.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Hilton, 620 Perry Parkway, Gaithersburg, MD 20877.

Contact Person: Anthony M. Coelho, Leader, Clinical Studies SRG, NIH, NHLBI, DEA, Rockledge Center II, 6701 Rockledge Drive, Room 7194, Bethesda, MD 20892-7924, (301) 435-0288.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Early Access to Defibrillation for Victims of Out of Hospital Cardiac Arrest.

Date: June 9, 1999.

Time: 9 am to 1 pm.

Agenda: To review and evaluate contract proposals.

Place: Chevy Chase Holiday Inn, Chevy Chase, MD 20815.

Contact Person: Louise P. Corman, Scientific Review Administrator, Review Branch, NIH, NHLBI, Rockledge Building II, 6701 Rockledge Drive, Suite 7180, Bethesda, MD 20892-7924, (301) 435-0270.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Specialized Centers of Research (SCOR) in Ischemic Heart Disease.

Date: June 9-11, 1999.

Time: 7 pm to 5 pm.

Agenda: To review and evaluate grant applications.

Place: Hyatt—Arlington at Washington's Key Bridge, 1325 Wilson Boulevard, Arlington, VA 22209-9990.

Contact Person: S. Charles Selden, Scientific Review Administrator, NIH/NHLBI/DEA, Rockledge Center II, 6701 Rockledge Drive, Suite 7196, Bethesda, MD 20892-7924, 301/435-0288.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Mentored Clinical Scientist Development Awards and Independent Scientist Awards.

Date: June 15, 1999.

Time: 8 am to 6 pm.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn—Silver Spring, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: Eric H. Brown, Scientific Review Administrator, NIH, NHLBI, DEA, Rockledge Building II, 6701 Rockledge Drive, Suite 7204, Bethesda, MD C 7956, (301) 435-0299.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Airway Remodeling and Repair in Asthma.

Date: June 29-30, 1999.

Time: 8:30 am to 6 pm.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn—Silver Spring, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: Deborah P. Beebe, Leader, Cardiology/Pulmonary Scientific Review Group, Rockledge Center II, 6701 Rockledge Drive, Suite 7178, Bethesda, MD 20892-7924, 301/435/0270.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases

and Resources Research, National Institutes of Health, HHS)

Dated: May 11, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99-12429 Filed 5-17-99; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel, Rodent Production Center.

Date: May 24, 1999.

Time: 9:30 am to 12 pm.

Agenda: To review and evaluate contract proposals.

Place: NIEHS, 79 T.W. Alexander Drive, Building 4401, Conference Room 3446, Research Triangle Park, NC 27709 (Telephone Conference Call).

Contact Person: Linda K. Bass, Scientific Review Administrator, NIEHS, PO Box 12233 EC-24, Research Triangle Park, NC 27709, (919) 541-1307.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing; 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences, National Institutes of Health, HHS)

Dated: May 11, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99-12422 Filed 5-17-99; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Nursing Research Special Emphasis Panel, NINR Mentored Research Scientist Development Award for Minority Investigators (K01).

Date: June 23, 1999.

Time: 8:30 am to 5 pm.

Agenda: To review and evaluate grant applications and/or proposals.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Mary J. Stephens-Frazier, Scientific Review Administrator, National Institute of Nursing Research, National Institutes of Health, Natcher Building, Room 3AN32, Bethesda, MD 20892, (301) 594-5971.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: May 11, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99-12423 Filed 5-17-99; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Clinical Center; Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of The Board of Scientific Counselors of the Warren Grant Magnuson Clinical Center.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the Clinical Center, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: The Board of Scientific Counselors of the Warren Grant Magnuson Clinical Center.

Date: June 21-22, 1999.

Time: 8:30 am to 5 pm.

Agenda: To review and evaluate personal qualifications and performance, and competence to individual investigators.

Place: National Institutes of Health, Clinical Center Medical Board Room, 2C116, 9000 Rockville Pike, Bethesda, MD 20892.

Contact Person: David K. Henderson, Deputy Director for Clinical Care, Office of the Director, Clinical Center, National Institutes of Health, Building 10, Room 2C146, Bethesda, MD 20892, 301/402-0244.

Dated: May 11, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, National Institutes of Health.

[FR Doc. 99-12431 Filed 5-17-99; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a list of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (301) 443-7978.

Persistent Effects of Treatment in Cuyahoga County, Ohio—New

The Center for Substance Abuse Treatment (CSAT) is undertaking a major initiative to study the long-term course of substance abuse within the context of receipt of substance abuse treatment. It has often been observed that success in treating substance abuse may require multiple episodes of treatment. The Persistent Effects of Treatment Studies (PETS) will be a family of studies structured to provide data on a wide range of populations and treatment approaches over a three-year period following admission to a substance abuse treatment program in a community setting. The family of studies will be built on existing studies currently being conducted by other

organizations (including Federal, State, and local governments) in order to minimize costs and response burden. Collectively, the PETS studies are expected to provide valuable insights into the factors that lead to long-term success in treatment of substance abuse.

Persistent Effects of Treatment in Cuyahoga County, Ohio, is the first of these studies. Under the aegis of an existing, CSAT-funded, Target Cities cooperative agreement, the county has built a strong substance abuse treatment information capability including standardized client intake assessment using the computerized Central Intake Assessment Instrument (CIAI-C), sound and comprehensive treatment information systems, and ongoing client follow-up at 6- and 12-months after treatment. This proposed project will build upon this foundation by conducting additional interviews at 24, 30, and 36 months after treatment admission using the computerized CIAI-C Followup version. At month 36, additional information needed to construct a natural history of substance use, treatment, criminal justice involvement, and employment for each subject over the previous 4-year period will be collected.

The estimated response burden over the three-year period of approval is summarized below.

	Number of respondents	Number of responses/respondent	Average burden/response	Total burden hours
CIAI-C Followup Interview: 24, 30 and 36 months	806	3	1.5	3,627
CIAI-C Followup Interview: 30 and 36 months	453	2	1.5	1,359
Natural History Interview	1,259	1	1.0	1,038
Total	1,259			6,245
3-year average				2,082

* The client cohort is comprised of 1,259 treatment clients. Some clients will have the 24-month interview conducted under Target Cities funding and some will be under PETS funding.

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to: Daniel Chenok, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, D.C. 20503.

Dated: May 12, 1999.

Richard Kopanda,

Executive Officer, SAMHSA.

[FR Doc. 99-12443 Filed 5-17-99; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Supplemental Grant Award to the Farm Resource Center (FRC) of Cairo, Illinois To Continue the Mental Health Outreach to Coal Miners, Farmers, and Their Families Program

AGENCY: Center for Mental Health Services (CMHS), Substance Abuse and

Mental Health Services Administration (SAMHSA), HHS

ACTION: Supplement to continue outreach services in Illinois and West Virginia and to expand activities into other areas of West Virginia and into western Pennsylvania.

SUMMARY: This notice is to inform the public that approximately \$600,000 will be available in FY 1999 to the Farmers Resource Center (FRC) of Cairo, Illinois to supplement their current grant award under the 1997 announcement *Mental Health Outreach to Coal Miners, Farmers, and Their Families*. Support will be provided for up to one year. The purpose of the award is to continue outreach activities that ameliorate stress associated with unemployment in rural communities and to increase access to, and utilization of, mental health and substance abuse services for coal miners, farmers, and their families in Illinois and West Virginia and to expand activities into additional areas of West Virginia and western Pennsylvania. This program is intended to address the needs of adults and their families in rural areas who have or may be at risk for developing a mental illness of substance abuse problem as well as their children who have or may be at risk for developing emotional or other behavioral problems. CMHS will make the awards based on the recommendations of the initial review group and the CMHS National Advisory Council.

This is not a request for applications. Eligibility for this grant award is limited to the currently funded Farm Resource Center (FRC) of Cairo, Illinois. The FRC has provided mental health and substance abuse outreach services in rural Illinois and parts of West Virginia. FRC has provided counseling to farmers, coal miners and their families, created a Statewide hotline, and utilized outreach counselors to work with rural families in their homes to address problems such as depression, alcoholism and domestic violence. The purpose of this supplemental award is to continue outreach activities in Illinois and parts of West Virginia and western Pennsylvania. The supplemental work is inextricably linked to the current activities the FRC is performing and the FRC is uniquely situated to provide services in western Pennsylvania and West Virginia in addition to Illinois. Therefore, the FRC is the only organization that may appropriately apply for this supplement to the existing award.

Authority: These supplemental awards will be made under the authority of section 520A of the Public Health Service Act, as

amended (42 U.S.C. 290bb-32). The Catalog of Federal Domestic Assistance (CFDA) number for this program is 93.125.

FOR FURTHER INFORMATION CONTACT: Mr. Santo (Buddy) Ruiz, Division of Knowledge Development and Systems Change, Center for Mental Health Services, Substance Abuse and Mental Health Services Administration, 5600 Fishers Lane, Room 11C-22, Rockville, Maryland 20857; 301-443-3653.

Dated: May 7, 1999.

Richard Kopanda,

Executive Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 99-12398 Filed 5-17-99; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Treatment; Notice of Meeting

Pursuant to Public Law 92-463, notice is hereby given of a meeting of the Center for Substance Abuse Treatment (CSAT) National Advisory Council to be held in June 1999.

A portion of the meeting will be open and include discussion of the Center's National Treatment Plan, policy issues and current administrative, legislative, and program developments. Reports to the Council will include NPRM on Opioid Treatment Accreditation, SAMHSA/CSAT Communication Strategies, Buprenorphine, Co-occurring and HIV/AIDS Subcommittees, the Alliance Project, ONDCP Media Campaign, and the ACF Report on Child Welfare.

If anyone needs special accommodations for persons with disabilities, please notify the Contact listed below.

The meeting will also include the review, discussion, and evaluation of a single source grant application. Therefore a portion of the meeting will be closed to the public as determined by the Administrator, SAMHSA, in accordance with Title 5 U.S.C. 552b(c)(3), (4), and (6) and 5 U.S.C. App. 2, section 10(d).

A summary of the meeting and roster of council members may be obtained from: Mrs. Marjorie Cashion, CSAT, National Advisory Council, Rockwall II Building, Suite 619, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (301) 443-8923.

Substantive program information may be obtained from the contact whose

name and telephone number is listed below.

Committee Name: Center for Substance Abuse Treatment, National Advisory Council.

Meeting Date: June 11, 1999—8:30 a.m.—5 p.m.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, Maryland 20814.

Type: Closed: June 11, 1999—8:30 a.m.—9 a.m.

Open: June 11, 1999—9:00 a.m.—5 p.m.

Contact: Marjorie M. Cashion, Executive Secretary, Telephone: (301) 443-8923, and FAX: (301) 480-6077.

Dated: May 12, 1999.

Sandi Stephens,

Extramural Activities Team Leader, Substance Abuse and Mental Health Services Administration.

[FR Doc. 99-12399 Filed 5-17-99; 8:45 am]

BILLING CODE 4162-20-U

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4441-N-25]

Submission for OMB Review: Canvass of Moving to Opportunity Families

AGENCY: Office of the Assistant Secretary for Administration, HUD.

ACTION: Notice.

SUMMARY: The Department of Housing and Urban Development seeks updated locating and states information on participants in the Moving to Opportunity study to contact them for follow-up studies. The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due date: June 17, 1999.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within thirty (30) days from the date of this Notice. Comments should refer to the proposal by name and/or OMB approval number and should be sent to: Joseph F. Lackey, Jr., OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 708-1305. This is not a toll-free number. Copies of the proposed

forms and other available documents submitted to OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will

be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, U.S.C. 35, as amended.

Dated: May 11, 1999.

David S. Cristy,
Director, Information Technology Capital Planning Staff.

Title of Proposal: Canvass of Moving to Opportunity Families.

Office: Policy Development and Research.

OMB Approval Number: 2528-0189

Description of the Need for the Information and its Proposed Use: The Department of Housing and Urban Development seeks updated locating and status information on participants in the Moving to Opportunity study to contact them for follow-up studies.

Form Number: None.

Respondents: Individuals or households.

Frequency of Submission: Annually.

Reporting Burden:

	Number of Respondents	×	Frequency of Response	×	Hours per Response	×	Burden Hours
First Canvass	5931		1		.18		1099
Second Canvass	7557		1		.17		1346
Third Canvass	8295		1		.25		2131

Total Estimated Burden Hours: 4,576.

Status: Reinstatement, with changes.

Contact: Joan F. Kraft, HUD, (202) 708-4504 ext. 5734, Joseph F. Lackey, Jr., OMB, (202) 395-7316.

Dated: May 11, 1999.

[FR Doc. 99-12503 Filed 5-17-99; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Privacy Act of 1974; As Amended; Revisions to an Existing System of Records

AGENCY: Office of the Secretary, U.S. Department of the Interior.

ACTION: Proposed revisions to an existing system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), the Office of the Secretary is issuing public notice of its intent to modify an existing Privacy Act system of records notice, OS-85, "Payroll, Attendance, Retirement, and Leave Records." The revisions will update the number of the system, the routine uses of records maintained in the system and safeguards statements, and the address of the system locations and system manager.

EFFECTIVE DATE: These actions will be effective May 18, 1999.

FOR FURTHER INFORMATION CONTACT: Chief, FPPS Program Management Division, National Business Center, U.S. Department of the Interior, 7301 West Mansfield Avenue, MS D-2400, Denver, CO 80235-2230.

SUPPLEMENTARY INFORMATION: The Department of the Interior is proposing to amend the system notice for OS-85, "Payroll, Attendance, Retirement, and Leave Records," to update the number of the system to more accurately reflect its Department-wide scope, to update the routine uses of records maintained in the system statement to add "budget programs" to the list of primary internal uses of the records, to update the safeguards statement to more accurately describe how the records are maintained, and to update the address of the system locations and system manager to reflect changes that have occurred since the notice was last published. Accordingly, the Department of the Interior proposes to amend the "Payroll, Attendance, Retirement, and Leave Records," OS-85, system notice in its entirety to read as follows:

Sue Ellen Sloca,

Office of the Secretary Privacy Act Officer, National Business Center.

INTERIOR/DOI-85

SYSTEM NAME:

Payroll, Attendance, Retirement, and Leave Records—Interior, DOI-85.

SYSTEM LOCATION:

(1) FPPS Program Management Division, National Business Center, U.S. Department of the Interior, 7301 West Mansfield Avenue, MS D-2400, Denver, CO 80235-2230.

(2) All Departmental offices and locations which prepare and provide input documents and information for data processing and administrative actions.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

(1) All employees of the Department of the Interior.

(2) Employees of independent agencies, councils, and commissions (which are supported, administratively, by the Office of the Secretary.)

CATEGORIES OF RECORDS IN THE SYSTEM:

Employee name, Social Security number, and organizational code; pay rate and grade, retirement, and location data; length of service; pay, leave, time and attendance, allowances, and cost distribution records; deductions for Medicare or FICA, savings bonds, FEGLI, union dues, taxes, allotments, quarters, charities, health benefits, Thrift Savings Fund contributions, awards, shift schedules, pay differentials, IRS tax lien data, commercial garnishments, child support and/or alimony wage assignments; and related payroll and personnel data. Also included is information on debts owed to the government as a result of

overpayment, refunds owed, or a debt referred for collection on a transferred employee. The payroll, attendance, retirement, and leave records described in this notice form a part of the information contained in the Department's integrated Federal Personnel Payroll System (FPPS). Personnel records contained in the system are covered under the government wide system of records notice published by the Office of Personnel Management (OPM/GOVT-1) and the Departmentwide system of records notice, "Interior Personnel Records," DOI-79.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:
5 U.S.C. 5101, et seq; 31 U.S.C. 3512.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

The primary uses of the records are for fiscal operations for payroll, attendance, leave, insurance, tax, retirement, budget, and cost accounting programs; and to prepare related reports to other Federal agencies including the Department of the Treasury and the Office of Personnel Management. Disclosures outside the Department of the Interior may be made:

(1) To the Department of the Treasury for preparation of payroll (and other) checks and electronic funds transfers to Federal, State, and local government agencies, non-governmental organizations, and individuals.

(2) To the Internal Revenue Service and to State, local, tribal and territorial governments for tax purposes.

(3) To the Office of Personnel Management in connection with programs administered by that office.

(4) To another Federal agency to which an employee has transferred.

(5) To the Department of Justice, or to a court, adjudicative or other administrative body, or to a party in litigation before a court or adjudicative or administrative body, when: (a) One of the following is a party to the proceeding or has an interest in the proceeding: (1) The Department or any component of the Department; (2) Any Departmental employee acting in his or her official capacity; (3) Any Departmental employee acting in his or her individual capacity where the Department or the Department of Justice has agreed to represent the employee; or (4) The United States, when the Department determines that the Department is likely to be affected by the proceeding; and (b) The Department deems the disclosure to be: (1) Relevant and necessary to the proceeding; and (2) Compatible with the purpose for which it compiled the information.

(6) To the appropriate Federal, State, tribal, local or foreign governmental agency that is responsible for investigating, prosecuting, enforcing or implementing a statute, rule, regulation order or license, when the Department becomes aware of an indication of a violation or potential violation of the statute, rule, regulation, order or license.

(7) To a congressional office in response to an inquiry to that office by the individual to whom the record pertains.

(8) To a Federal agency which has requested information relevant or necessary to its hiring or retention of an employee, or issuance of a security clearance, license, contract, grant or other benefit.

(9) To Federal, State or local agencies where necessary to enable the Department of the Interior to obtain information relevant to the hiring or retention of an employee, or the issuance of a security clearance, contract, license, grant or other benefit.

(10) To appropriate Federal and State agencies to provide required reports including data on unemployment insurance.

(11) To the Social Security administration to report FICA deductions.

(12) To labor unions to report union dues deductions.

(13) To insurance carriers to report withholdings for health insurance.

(14) To charitable institutions to report contributions.

(15) To a Federal agency for the purpose of collecting a debt owed the Federal government through administrative or salary offset.

(16) To other Federal agencies conducting computer matching programs to help eliminate fraud and abuse and to detect unauthorized overpayments made to individuals.

(17) To provide addresses obtained from the Internal Revenue Service to debt collection agencies for purposes of locating a debtor to collect or compromise a Federal claim against the debtor.

(18) With respect to Bureau of Indian Affairs employee records, to a Federal, State, local agency, or Indian tribal group or any establishment or individual that assumes jurisdiction, either by contract or legal transfer, of any program under the control of the Bureau of Indian Affairs.

(19) With respect to Bureau of Reclamation employee records, to non-Federal auditors under contract with the Department of the Interior or Energy or water user and other organizations with which the Bureau of Reclamation has written agreements permitting access to

financial records to perform financial audits.

(20) To the Federal Retirement Thrift Investment Board with respect to Thrift Savings Fund contributions.

(21) To disclose debtor information to the Internal Revenue Service, or to another Federal agency or its contractor solely to aggregate information for the Internal Revenue Service, to collect debts owed to the Federal government through the offset of tax refunds.

(22) To disclose the names, social security numbers, home addresses, dates of birth, dates of hire, quarterly earnings, employer identifying information, and State of hire of employees to the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services for the purposes of locating individuals to establish paternity, establishing and modifying orders of child support, identifying sources of income, and for other child support enforcement actions as required by the Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Law, Pub. L. 104-193).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosure pursuant to 5 U.S.C. 552a(b)(12). Disclosures may be made from this system to consumer reporting agencies as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Act of 1966 (31 U.S.C. 3701(a)(3)).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in manual, microfilm, microfiche, electronic, imaged and computer printout form. Current records are stored on magnetic media at the central computer processing center; historic records are stored on magnetic media at the central computer center. Original input documents are stored in standard office filing equipment and/or as imaged documents on magnetic media at all locations which prepare and provide input documents and information for data processing.

RETRIEVABILITY:

Records are retrieved by name, Social Security number, and organizational code.

SAFEGUARDS:

Access to all records in the system is limited to authorized personnel whose official duties require such access.

Office officials generally have access only to records pertaining to employees of their offices. Paper or micro format records are maintained in locked metal file cabinets in secured rooms. Electronic records are maintained with safeguards meeting the security requirements of 43 CFR 2.51.

RETENTION AND DISPOSAL:

The records contained in this system of records have varying retention periods as described in General Records Schedule 2, (which you can find at <http://www.nara.gov>), issued by the Archivist of the United States, and are disposed of in accordance with the National Archives and Records Administration Regulations, 36 CFR part 1228 et seq.

SYSTEM MANAGER(S) AND ADDRESS:

The following system manager is responsible for the payroll records contained in the Department's integrated Federal Personnel Payroll System (FPPS). Personnel records contained in the system fall under the jurisdiction of the Office of Personnel Management as prescribed in 5 CFR part 253 and 5 CFR part 297: Chief, FPPS Management Division, National Business Center, U.S. Department of the Interior, 7301 West Mansfield Avenue, Denver, CO 80235-2230.

NOTIFICATION PROCEDURES:

Inquiries regarding the existence of records should be addressed to the System Manager. The request must be in writing, signed by the requester, and meet the content requirements of 43 CFR 2.60.

RECORDS ACCESS PROCEDURES:

A request for access may be addressed to the System Manager. The request must be in writing, signed by the requester, and meet the content requirements of 43 CFR 2.63.

CONTESTING RECORDS PROCEDURES:

A petition for amendment should be addressed to the System Manager. The request must be in writing, signed by the requester, and meet the content requirements of 43 CFR 2.71.

RECORD SOURCE CATEGORIES:

Individuals on whom the records are maintained, official personnel records of individuals on whom the records are maintained, supervisors, timekeepers, previous employers, and the Internal Revenue Service.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 99-12446 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-RK-P

DEPARTMENT OF THE INTERIOR**Office of the Secretary****Privacy Act of 1974; As Amended; Revisions to an Existing System of Records**

AGENCY: Office of the Secretary, Department of the Interior.

ACTION: Proposed revisions to an existing system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), the Office of the Secretary is issuing public notice of its intent to modify an existing Privacy Act system of records notice, OS-76, "Employee Experience, Skills, Performance, Training, and Career Development Records." The revisions will update the name and number of the system and the address of the system locations and system managers.

EFFECTIVE DATE: These actions will be effective May 18, 1999.

FOR FURTHER INFORMATION CONTACT: Team Leader, Executive Resources and Career Management Group, Office of Personnel Policy, U.S. Department of the Interior, 1849 C Street NW, MS-5221 MIB, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The Department of the Interior is proposing to amend the system notice for OS-76, "Employee Experience, Skills, Performance, Training, and Career Development Records," to update the name and number of the system to more accurately reflect its Department-wide scope, and to update the address of the system locations and system managers to reflect changes that have occurred since the notice was last published. Accordingly, the Department of the Interior proposes to amend the "Employee Experience, Skills, Performance, Training, and Career Development Records," OS-76, system notice in its entirety to read as follows:

Sue Ellen Sloca,

*Office of the Secretary Privacy Act Officer,
National Business Center.*

INTERIOR /DOI-76**SYSTEM NAME:**

Employee Training and Career Development Records—Interior, DOI—76.

SYSTEM LOCATION:

(1) Office of Personnel Policy, U.S. Department of the Interior, 1849 C Street NW, MS-5221 MIB, Washington, DC 20240.

(2) Bureau personnel offices:
(a) Bureau of Indian Affairs, Division of Personnel Management, 1951

Constitution Avenue NW, Washington, DC 20245.

(b) U.S. Geological Survey, National Center, 12201 Sunrise Valley Drive, Reston, VA 22092.

(c) U.S. Fish and Wildlife Service, Division of Personnel Management and Organization, 1849 C Street NW, Washington, DC 20240.

(d) Bureau of Reclamation, P.O. Box 25001, Denver, CO 80225.

(e) Bureau of Land Management, Division of Personnel (530), 1849 C Street NW, Washington, DC 20240.

(f) National Park Service, Division of Personnel, Branch of Labor Management Relations, 1849 C Street NW, Washington, DC 20240.

(g) Minerals Management Service, Personnel Division, 1110 Herndon Parkway, Herndon, VA 22070.

(h) Office of Surface Mining, Division of Personnel, 1951 Constitution Avenue NW, Washington, DC 20245.

(3) For Contracting Officers' Warrant System records:

(a) Office of Acquisition and Property Management, U.S. Department of the Interior, 1849 C Street NW, MS-5512 MIB, Washington, DC 20240.

(b) Each bureau's central contracting office. (For a list of these, contact the Office of Acquisition and Property Management or consult the Department of the Interior's Internet site at <http://www.doi.gov/pam/acqsites.html>.)

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current employees of the Department of the Interior.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name of employee; date of birth; Social Security number; office address and phone number; service computation date; physical limitations or interests which might affect type of location of assignment; career interests; education history; work or skills experience; availability for geographic relocation; outside activities including membership in professional organizations; listing of special qualifications; licenses and certificates held; listing of honors and awards; career goals and objectives; training completed; annual supervisory evaluation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 1302, 2951, 4118, 4308, 4506, 3101; 43 U.S.C. 1457; Reorganization Plan 3 of 1950; E.O. 10561, E.O. 12352.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The primary uses of the records are:
(a) By bureau officials for purposes of review in connection with transfers,

promotions, reassignments, adverse actions, disciplinary actions, and determination of qualifications of an individual.

(b) By bureau officials for setting out career goals and objectives for an employee and for documenting attainment of these targets.

(c) By bureau and Departmental officials in monitoring qualifications for maintaining a Contracting Officer's Warrant.

Disclosures outside the Department of the Interior may be made:

(1) To the U.S. Department of Justice or in a proceeding before a court or adjudicative body with jurisdiction when (a) the United States, the Department of the Interior, a component of the Department, or, when represented by the government, an employee of the Department is a party to litigation or anticipated litigation or has an interest in such litigation, and (b) the Department of the Interior determines that the disclosure is relevant or necessary to the litigation and is compatible with the purpose for which the records were compiled.

(2) To appropriate Federal, State, local or foreign agencies responsible for investigating or prosecuting the violation of or for enforcing or implementing a statute, rule, regulation, order or license, when the disclosing agency becomes aware of a violation or potential violation of a statute, rule, regulation, order or license.

(3) To a congressional office in response to an inquiry an individual has made to the congressional office.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records are stored in file folders, in file cabinets. Electronic records are stored on disk, tape or other appropriate media.

RETRIEVABILITY:

Records are retrieved by name of individual.

SAFEGUARDS:

Access to records is limited to authorized personnel. Paper records are maintained in locked file cabinets. Electronic records are maintained with safeguards meeting minimum security requirements of 43 CFR 2.51.

RETENTION AND DISPOSAL:

Records are maintained only on current employees. Records are destroyed upon departure of employees.

SYSTEM MANAGER(S) AND ADDRESSES:

(1) Team Leader, Executive Resources and Career Management Group, Office of Personnel Policy, U.S. Department of the Interior, 1849 C Street NW, MS-5221 MIB, Washington, DC 20240.

(2) Bureau personnel officers:

(a) Director of Administration, Bureau of Indian Affairs, Division of Personnel Management, 1951 Constitution Avenue NW, Washington, DC 20245.

(b) Personnel Officer, U.S. Geological Survey, National Center, 12201 Sunrise Valley Drive, Reston, VA 22092.

(c) Personnel Officer, U.S. Fish and Wildlife Service, Division of Personnel Management and Organization, 1849 C Street NW, Washington, DC 20240.

(d) Labor Relations Officer, Bureau of Reclamation, P.O. Box 25001, Denver, CO 80225.

(e) Personnel Officer, Bureau of Land Management, Division of Personnel (530), 1849 C Street NW, Washington, DC 20240.

(f) Personnel Officer, National Park Service, Division of Personnel, Branch of Labor Management Relations, 1849 C Street NW, Washington, DC 20240.

(g) Personnel Officer, Minerals Management Service, Personnel Division, 1110 Herndon Parkway, Herndon, VA 22070.

(h) Personnel Officer, Office of Surface Mining, Division of Personnel, 1951 Constitution Avenue NW, Washington, DC 20245.

(3) For Contracting Officers' Warrant System records: Director, Office of Acquisition and Property Management, U.S. Department of the Interior, 1849 C Street NW, MS-5512 MIB, Washington, DC 20240.

NOTIFICATION PROCEDURES:

An individual requesting notification of the existence of records on him or her should address his/her request to the appropriate System Manager. The request must be in writing, signed by the requestor, and comply with the content requirements of 43 CFR 2.60.

RECORD ACCESS PROCEDURES:

An individual requesting access to records maintained on him or her should address his/her request to the appropriate System Manager. The request must be in writing, signed by the requestor, and comply with the requirements of 43 CFR 2.63.

CONTESTING RECORD PROCEDURES:

An individual requesting amendment of a record maintained on him or her should address his/her request to the appropriate System Manager. The request must be in writing, signed by the requestor, and comply with the content requirements of 43 CFR 2.71.

RECORD SOURCE CATEGORIES:

Departmental employees and agency officials.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 99-12447 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-RJ-P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Fish and Wildlife Service

Multi-Species Conservation Program (MSCP) for the Lower Colorado River, Arizona, Nevada, and California

ACTION: Notice of Intent to prepare an Environmental Impact Statement (EIS)/ Environmental Impact Report (EIR) and notice of public scoping meetings.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA), Bureau of Reclamation (Reclamation), Fish and Wildlife Service (Service), and the Metropolitan Water District of Southern California, intend to prepare an EIS/EIR to evaluate the impacts associated with implementing the MSCP for the Lower Colorado River in the states of Arizona, Nevada, and California.

DATES AND ADDRESSES: Written comments on conservation alternatives and issues to be addressed in the EIS/EIR are requested by July 27, 1999, and should be sent to Mr. Tom Shrader, Attention: LC-2500, Bureau of Reclamation, PO Box 61470, Boulder City, NV 89006-1470, or FAX'd to Mr. Shrader at (702) 293-8146. Oral and written comments will be accepted at the open house format public scoping meetings to be held at the following locations:

June 15, 1999, 5:00 p.m., Bureau of Land Management Havasu Field Office, 2610 Sweetwater Drive, Lake Havasu City, Arizona.

June 16, 1999, 5:00 p.m., Avi Hotel and Casino, 10000 Aha Macav Parkway, Laughlin, Nevada.

June 17, 1999, 5:00 p.m., Henderson Convention Center, 200 South Water Street, Henderson, Nevada.

June 22, 1999, 5:00 p.m., Yuma Desalting Plant, Bureau of Reclamation, 7301 Calle Agua Salada, Yuma, Arizona.

June 23, 1999, 5:00 p.m., Arizona Department of Water Resources, conference rooms A and B, third floor, 500 North 3rd Street, Phoenix, Arizona.

June 30, 1999, 5:00 p.m., Veterans of Foreign Wars Hall Post 2987, 148 North 1st Street, Blythe, California.
 July 1, 1999, 5:00 p.m., Ontario Airport Marriott, 2200 East Holt Boulevard, Ontario, California.

FOR FURTHER INFORMATION CONTACT: Mr. Tom Shrader, Manager, Environmental Compliance, Bureau of Reclamation at (702) 293-8703 or Mr. Gilbert D. Metz, Supervisory Coordinator for Federal Projects, Fish and Wildlife Service at (602) 640-2720, ext. 217. Questions regarding the CEQA process should be directed to Dr. Debbie Drezner, Metropolitan Water District at (213) 217-6218. Information on the purpose, membership, meeting schedules and documents associated with the MSCP may be obtained on the Internet at www.lcrmscp.org, with a supplemental link to Reclamation's web page at www.lc.usbr.gov.

SUPPLEMENTARY INFORMATION: The proposed action is a multi-species conservation program that will move Federal and California Endangered Species Act (ESA and CESA) listed species, and potentially listed species, toward recovery while accommodating current water and power operations and optimizing opportunities for future water and power development. Reclamation and the Service are joint Federal leads for the EIS. The EIS will be the basis for (1) Reclamation's Record of Decision on implementing its portion of the MSCP and (2) the Service's Record of Decision on issuing an ESA section 10 permit. The EIS/EIR document will also include a biological assessment of Reclamation's ongoing and future discretionary actions, which the Service will utilize in preparing a biological opinion per section 7 of the ESA. The Metropolitan Water District is the designated CEQA lead agency for the EIR.

The Lower Colorado River MSCP is a partnership of state, Federal, tribal, and other public and private stakeholders with interest in managing the water and related resources of the Lower Colorado River basin. In August of 1995, the Department of the Interior and the states of Arizona, Nevada, and California entered into a Memorandum of Agreement and later a Memorandum of Clarification (MOA/MOC) for Development of a Lower Colorado River Multi-Species Conservation Program. The purpose of the MOA/MOC was to initiate development of an MSCP that will: (1) conserve habitat and work toward the recovery of threatened and endangered species as well as reduce the likelihood of additional species listings under the ESA and the CESA,

and (2) accommodate current water diversions and power production and optimize opportunities for future water and power development, to the extent consistent with the law.

The participants agreed to develop, implement, and fund the MSCP. It was also agreed to pursue an ecosystem-based approach to developing the MSCP for interim and long-term compliance with applicable endangered species and environmental laws and to implement conservation and protection measures for included species and habitats.

It is proposed that the MSCP will serve as a coordinated, comprehensive conservation approach for the lower Colorado River basin within the 100-year floodplain from below Glen Canyon Dam to the Southerly International Boundary with Mexico for a period of 50 years. Potential conservation measures or alternatives currently under consideration for various fish species (e.g., endangered razorback sucker) and their habitats may include evaluating the use of backwaters between native and nonnative species; managing to minimize conflicts between native and nonnative aquatic species by constructing isolated native fish refugia; restoring floodplain connections and ephemeral backwaters in an effort to restore floodplain functions; augmenting native fish populations through stocking and additional rearing capacity; implementing a genetic management plan for native fish populations; enhancing fish passage; managing to minimize take; and managing discretionary flows to enhance and restore habitat. Potential conservation measures or alternatives currently under consideration to benefit various bird species (e.g., endangered southwestern willow flycatcher) and their habitats may include protecting and restoring habitat; protecting existing habitat through activities such as managing access; maintaining hydrologic conditions; fire protection using prescribed fires/fire planning and postfire rehabilitation; converting agricultural land to habitat (acquire land and water rights from willing sellers); managing large mammal problems (e.g., burro grazing and trampling); controlling threats from other species such as cowbird trapping; vegetation management including the need to improve habitat; and manipulating discretionary flows to enhance and restore habitat. Additional conservation measures or alternatives may be identified during the scoping process. The needs of these and other species identified in the MSCP will be integrated to maximize biodiversity of the Lower Colorado River. Research and

monitoring in combination with adaptive management will be used to facilitate accomplishment of these goals.

Under the No Action/No Project alternative, it is assumed that some or all of the current and future projects proposed for coverage under the MSCP would be implemented, as long as they are in compliance with the ESA. The No Action/No Project alternative would imply that the impacts from these potential projects on sensitive species and habitats would be evaluated and mitigated on a project-by-project basis, as is presently the case. Individual ESA Section 10 permits would be required for activities involving take of listed species due to nonfederal projects/actions. Without a coordinated, comprehensive ecosystem-based conservation approach for the region, listed species may not be adequately addressed by individual project-specific mitigation requirements, unlisted "at risk" species would not receive proactive action intended to prevent their listing, and project-specific mitigation would be less cost effective in helping Federal and nonfederal agencies work toward recovery of listed species. Current independent conservation actions would continue, although some of these are not yet funded.

A public involvement program has been initiated and will be maintained throughout this EIS/EIR process. The goal is to keep the public and affected parties informed and actively involved as the project evolves. Given the number of entities participating (Federal, State, and local governments, tribes, and private interest groups), successfully providing information and soliciting feedback are critical to the project's effectiveness.

Probable Environmental Effects—Following is a preliminary list of probable environmental issues and effects associated with the project. Other issues may be identified during the internal MSCP and public scoping process. Until a firm proposal and alternatives with specific actions and locations are developed, it is difficult to predict specific impacts.

Biological Resources—Among the endangered species known to use the project area are the southwestern willow flycatcher, Yuma clapper rail, razorback sucker, bonytail, peregrine falcon, and bald eagle (being considered for delisting). Of prime concern will be the conservation of these and other species, such as the yellow billed cuckoo (under review for listing under the ESA), and associated habitat within the 100-year floodplain. Overall impacts on

biological resources are expected to be positive.

Hydrology and Water Quality—Certain conservation measures and flow regimes may alter onsite water resources, including waters of the United States [as defined in 40 CFR 230.3(s)], which are under the U.S. Army Corps of Engineers (Corps) jurisdiction. Under Section 404 of the Clean Water Act, the Corps is responsible for issuing a permit if a project may result in the placement of material into water of the United States. Until specific alternatives are developed, the effects on hydrology and water quality are unknown.

Floodplains and Wetlands—Implementation of the MSCP will have overall beneficial impacts on floodplains and wetlands, especially in maintaining or creating backwaters (wetlands) and reestablishing native riparian habitat which is essential to the recovery of species.

Municipal and Industrial Uses—Municipal and industrial water uses may be affected by various conservation measures that require additional water. However, it is the intent of the MSCP to accommodate these uses and optimize future opportunities while protecting threatened and endangered species and their habitat within the project area.

Cultural Resources—The program could disturb or affect archaeological resources, traditional cultural properties, Indian sacred sites, and Indian Trust Assets. However, it is the intent of the MSCP to avoid such effects.

Socioeconomics—The program may have overall beneficial socioeconomics effects on the Lower Colorado River. However, the extent of such effects will not be known until specific conservation alternatives are identified.

Recreation—In addressing species needs, there may be adverse impacts to localized recreational uses such as motorized boating, off-highway vehicle use, and angling.

Water and Hydroelectric Power Uses—Water and hydroelectric power uses may be affected by various conservation measures that involve discretionary release patterns. However, it is the intent of the MSCP to accommodate these uses while protecting threatened and endangered species and their habitat within the project area.

Agricultural and Other Land Uses—Current agricultural resources or operations and land uses may be impacted. Land use and cropping patterns would change with the voluntary conversion of agricultural lands to native riparian habitat or the

transfer of water rights for habitat maintenance and restoration.

International Impacts—Potential trans-boundary impacts to Mexico will be identified and analyzed. The project will not affect the delivery of water pursuant to the Mexico Water Treaty.

Environmental Justice—It is anticipated that the MSCP will not result in disproportionately high and adverse human health or environmental effects on minorities and/or low income populations.

Related Project Documentation—It is anticipated that the EIS/EIR process will make full use (including incorporation by reference, as appropriate, pursuant to NEPA and CEQA) of the following project documents, copies of which are available for inspection at the Metropolitan Water District, Reclamation, and Service offices:

Bureau of Reclamation, Description and Assessment of Operations, Maintenance, and Sensitive Species of the Lower Colorado River—Final Biological Assessment, August 1996
Fish and Wildlife Service, Biological and Conference Opinion on Lower Colorado River Operations and Maintenance—Lake Mead to Southerly International Boundary, April 1997.

Starting in June 1999, these documents may also be accessed through Reclamation's web site at www.lc.usbr.gov.

The draft EIS/EIR is expected to be completed by June 2000.

Dated: May 5, 1999.

LeGrand Neilson,

Assistant Regional Director, Lower Colorado Region, Bureau of Reclamation.

Geoffrey L. Haskett,

Acting Regional Director, Fish and Wildlife Service.

[FR Doc. 99-12316 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-94-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Sport Fishing and Boating Partnership Council

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: As provided in Section 10(a)(2) of the Federal Advisory Committee Act, the Service announces a meeting designed to foster partnerships to enhance public awareness of the importance of aquatic resources and the social and economic benefits of recreational fishing and boating in the United States. This meeting, sponsored

by the Sport Fishing and Boating Partnership Council (Council), is open to the public, and interested persons may make oral statements to the Council or may file written statements for consideration.

DATES: June 9, 1999, 1:30 p.m. to 4 p.m.

ADDRESSES: The meeting will be held at the Holiday Inn, 625 First Street, Alexandria, Virginia 22314, Telephone (703) 548-6300, FAX (703) 548-8032.

Summary minutes of the conference will be maintained by the Council Coordinator at 1033 North Fairfax Street, Suite 200, Arlington, VA 22314, and will be available for public inspection during regular business hours within 30 days following the meeting. Personal copies may be purchased for the cost of duplication.

FOR FURTHER INFORMATION CONTACT: Laury Parramore, Council Coordinator, at 703/836-1392.

SUPPLEMENTARY INFORMATION: The Sport Fishing and Boating Partnership Council (Council) will convene to discuss: (1) the ongoing effort to monitor and evaluate Federal agency activities pursuant to Executive Order 12962 for Recreational Fisheries; (2) the Council's role as a facilitator of discussions concerning national fisheries management issues; and (3) the Interior Secretary's approval of the Strategic Plan for the National Outreach and Communications Program and the Council's continued involvement in the administration of the plan. Under Executive Order 12962, the Council is required to monitor and annually report its findings on various Federal agencies' actions and policies for protecting, restoring, and enhancing recreational fishery resources. The Council will hear a report and recommendations from its Technical Working Group on this and other topics.

Dated: May 12, 1999.

John G. Rogers,

Deputy Director.

[FR Doc. 99-12454 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-55-M

DEPARTMENT OF THE INTERIOR

Geological Survey

Privacy Act of 1974, as Amended; Systems of Records

AGENCY: Geological Survey, Interior.

ACTION: Notice of deletion of three systems of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended (5 U.S.C. 552a), notice is hereby given that

the Department of the Interior is deleting three systems of records managed by the U.S. Geological Survey. The three systems of records are deleted because the information is no longer used by the U.S. Geological Survey.

DATES: These actions will be effective upon publication in the **Federal Register** (May 18, 1999).

FOR FURTHER INFORMATION CONTACT: Maureen Ackerman, U.S. Geological Survey Privacy Act Officer, at (703) 648-7311.

SUPPLEMENTARY INFORMATION:

Three systems of records being deleted and the reasons for deletion are listed below:

1. Interior/USGS-09, "National Research Council Grants Program," previously published in the **Federal Register** on August 1, 1991 (56 FR 36822). The USGS no longer maintains any information covered by the Privacy Act and relating to this program. Status of the records: Disposition instructions for Privacy Act records relating to rejected grant proposals are "Destroy 3 years after investigation is completed." All these records have been destroyed. For Grant and Cooperative Agreement Case Files it is "Destroy 6 years after case is closed." Following these disposition instructions some of the records have already been destroyed and the last of the records will be destroyed in December 1999.

2. Interior/USGS-25, "Water Data Sources Directory," previously published in the **Federal Register** on August 1, 1991 (56 FR 36823). This system is no longer operational since the National Water Data Exchange Program Office and its network of Assistance Centers were closed in 1997. Status of the records: The disposition instructions for these records states "Destroy after 3 or more update cycles or when data elements are superseded." The system was phased out, the Directory is no longer in use, and records subject to the Privacy Act were destroyed in July 1998 according to the system manager.

3. Interior/USGS-26, "National Water Data Exchange (NAWDEX) User Accounting System," previously published in the **Federal Register** on January 7, 1982 (47 FR 869). NAWDEX and its network of Assistance Centers are closed. As a result, there is no longer any need to maintain information on individuals. Status of the records: The Privacy Act records associated with this

System were destroyed in July 1998 according to the system manager.

Maureen K. Ackerman,
Geological Survey Privacy Act Officer.
[FR Doc. 99-12448 Filed 5-17-99; 8:45 am]
BILLING CODE 4310-31-M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Operation and Maintenance Rate Adjustment: Crow Irrigation Project, Montana

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Operation and Maintenance (O&M) Rate Adjustment.

SUMMARY: The Bureau of Indian Affairs (BIA) is adjusting the assessment rates for operating and maintaining the Crow Irrigation Project (Project), Montana for the years 1998, 1999, 2000, and 2001.

DATES: The adjusted irrigation rates are effective for each irrigation season as indicated in the table.

FOR FURTHER INFORMATION CONTACT: Keith Beartusk, Area Director, Bureau of Indian Affairs, Billings Area Office, 316 North 26th Street, Billings, Montana 59101-1362, telephone (406) 247-7998.

SUPPLEMENTARY INFORMATION: The authority to issue this document is vested in the Secretary of the Interior by 5 U.S.C. 301 and the Act of August 14, 1914 (38 Stat. 583, 25 U.S.C. 385). The Secretary has delegated this authority to the Assistant Secretary—Indian Affairs pursuant to part 209 Departmental Manual, Chapter 8.1A and Memorandum dated January 25, 1994, from Chief of Staff, Department of the Interior, to Assistant Secretaries, and Heads of Bureaus and Offices.

This notice is given in accordance with § 171.1(e) of part 171, subchapter H, chapter I, of title 25 of the Code of Federal Regulations, which provides for the fixing and announcing the rates for annual operation and maintenance assessments and related information of the Crow Irrigation Project for Calendar Year 1998 and subsequent years.

The assessment rates are based on a prepared estimate of the cost of normal operation and maintenance of the irrigation project. Normal operation and maintenance means the expenses we incur to provide direct support or benefit to the project's activities for administration, operation, maintenance, and rehabilitation. We must include at least:

(a) Personnel salary and benefits for the project engineer/manager and our

employees under his management/control;

- (b) Materials and supplies;
- (c) Major and minor vehicle and equipment repairs;
- (d) Equipment, including transportation, fuel, oil, grease, lease and replacement;
- (d) Capitalization expenses;
- (e) Acquisition expenses; and
- (f) Other expenses we determine necessary to properly perform the activities and functions characteristic of an irrigation project.

Payments

The irrigation operation and maintenance assessments become due based on locally established payment requirements. No water shall be delivered to any of these lands until all irrigation charges have been paid.

Interest and Penalty Fees

Interest, penalty, and administrative fees will be assessed, where required by law, on all delinquent operation and maintenance assessment charges as prescribed in the Code of Federal Regulations, title 4, part 102, Federal Claims Collection Standards, and 42 BIAM Supplement 3, part 3.8 Debt Collection Procedures. Beginning 30 days after the due date, interest will be assessed at the rate of the current value of funds to the U.S. Treasury. An administrative fee of \$12.50 will be assessed each time an effort is made to collect a delinquent debt; a penalty charge of 6 percent per year will be charged on delinquent debts over 90 days old and will accrue from the date the debt became delinquent. No water shall be delivered to any farm unit until all irrigation charges have been paid. After 180 days, a delinquent debt will be forwarded to the United States Treasury for further action in accordance with the Debt Collection Improvement Act of 1996 (Pub. L. 104-134).

Comments

On August 25, 1997, the BIA provided a notice in the **Federal Register**, 62 FR 44991, proposing to adjust the assessment rates for operating and maintaining the Project for 1998, 1999, 2000, 2001, and subsequent years. The notice of proposed rate adjustment provided a 30-day public comment period. Comments were received, the record was reviewed, and the following is in response to those comments.

Response to Comments: On August 25, 1997, the Assistant Secretary—Indian Affairs published in the **Federal Register** (62 FR 44991) a Notice of Proposed Irrigation Operation and

Maintenance (O&M) Rate Adjustment for the Project. The BIA sought comments to the proposed adjustments to the 1997 assessment rate of \$11.60 per acre. For 1998, the rate was proposed to increase by \$2.90, or 25 percent, to \$14.50 per assessable acre, and additional increases of 50 cents per assessable acre were proposed for the succeeding three years. In the notice, the BIA indicated that the proposed rates were based upon a prepared estimate of the costs of normal operation and maintenance of the Project. These costs included the expenses incurred by the BIA to provide direct support or benefit to the Project's activities, including salaries and benefits for Project personnel, materials and supplies, major and minor vehicle repairs, equipment, and other necessary expenses. The public was provided 30 days in which to comment on the proposed rate adjustment.

The BIA posted notices of the proposed rate adjustment at federal government facilities at the following towns in Montana: Hardin, Wyola, Saint Xavier, Garryowen, Crow Agency, and at the Billings Area Office, Billings, Montana. In addition, the notice was published in the "Big Horn County News, Hardin, Montana." The notice identified the proposed rate adjustment along with the date and location of a public meeting to be held to discuss the proposed rate adjustment. The public meeting took place on September 12, 1997, and was held at the BIA's Forestry Building, Crow Agency, Montana. At the public meeting, the Billings Area Office Irrigation Engineer and the Project Manager presented the budget for the 1998 rate. The proposed budget indicated that to meet projected operation and maintenance expenses, the Project would need to increase its annual rate for 1998, 1999, 2000, and 2001.

Comments were received from three individuals: Rodney Jabs of Hardin, MT; Reiny Jabs, Chairman, Big Horn District Water Users; and Lee Roy Schanaman, Big Horn District Director. Comments and objections were also filed by Douglas Y. Freeman, Secretary of the Big Horn Irrigation Users, attaching a Petition signed by 92 entities (including one duplicate and three corporations also represented by individual signers). The comments that were received opposed the proposed rate adjustment. The BIA has reviewed the comments to the proposed rate adjustment and the record compiled by the Project. Review of the proposed budget indicates that, in comparison to 1997, the proposed adjustments are in the areas of salaries, supplies and materials, and equipment.

Other expense categories propose only slight adjustments to reflect the annual increased costs of operating the Project.

Based upon this review and following due consideration of the comments received, the BIA concludes that the proposed rate adjustment is reasonable and necessary to ensure the continued operation and maintenance of the Project.

Comments regarding equipment, materials and personnel: Comments that were received stated concerns that the proposed rate adjustment will include an increase to support the acquisition of new equipment. The comments stated the belief that the Project presently has the appropriate equipment, materials and personnel to perform operation and maintenance of the system.

Response: Upon review of the Project's record, the BIA finds that, while existing equipment and personnel are adequate to perform minimal operation and maintenance functions, the Project does propose to accelerate its maintenance program to meet the demands of the water users, and to prevent future canal and lateral blowouts, such as the blowout that occurred in 1997 at the Soap Creek flume.

The unexpected cost of repairing the Soap Creek flume at the beginning of the irrigation season, reduced the Project's available funds. This required the Project to cut back its maintenance program and service to the water users. The proposed acceleration and expansion of the Project's preventive maintenance program to reduce the potential of future blowouts would increase the annual expenses of salaries, supplies, materials, and the maintenance and repair/replacement of existing heavy equipment.

The Project does anticipate replacing existing older heavy equipment that is reaching the end of its economical life. Moreover, increased expenditures to fund such necessary supplies as culverts, headgates, and concrete will benefit project operations. The Project does not propose expanding its current personnel allotment, but does anticipate filling currently vacant positions. The Project's allotted personnel roster consists of 1 project manager, 2 accounting technicians, 1 secretary, 1 supervisory civil engineer technician, 4 equipment operators, 2 lead irrigation system operators, and 6 irrigation system operators, for a total of 17 positions. Currently, the Project is operating with 1 project manager, 2 accounting technicians, 1 supervisory civil engineer technician, 3 equipment operators, 2 lead irrigation system operators, and 4 irrigation system

operators, for a total of 13 positions, a 24 percent vacancy rate. The Project personnel provide water to 36,965 irrigated acres, maintain and operate 346 miles of irrigation delivery system that contains 3,040 structures. The BIA thus finds the increase based upon equipment and personnel expenditures to be justified.

Comments regarding salary: The proposed salary budget constitutes two-thirds of the budget.

Response: The Project is composed of nine individual irrigation units within three water sheds. Those are the Big Horn, Little Big Horn, and Prior Creek water sheds. Project personnel provide water to 36,965 irrigated acres, and maintain and operate 346 miles of irrigation delivery system that contains 3,040 structures. The delivery of water requires that personnel traverse an area 70 miles one way.

A large percentage of the Project budget is required to meet salaries, due to the labor intensive nature of this Project. The project personnel who deliver water within the Big Horn and Prior Creek drainage, provide water to 24,582 acres, and maintain and operate 197 miles of irrigation delivery system and 1,514 structures. The personnel who deliver water to the Little Big Horn drainage, provide water to 12,383 acres, and maintain and operate 149 miles of irrigation delivery system and 1,526 structures. Delivering water and meeting the demands of the water users requires travel and constant monitoring and regulating over a large service area which requires a full work force of 17 personnel. These personnel are all paid from the O&M budget. To implement the proposed higher level of maintenance to reduce a rehabilitation backlog will require additional workforce expenditures. The BIA finds that the proposed budget for salaries to accomplish this is reasonable.

Comments regarding the percentage of the rate increase in one year: Comments complained of the 25 percent increase in one year with an overall increase of 38 percent.

Response: A review of the budget indicates that the proposed increases were based upon the previous six years of project expenses coupled with a stable O&M rate, and the expected inflation over the next four years. The future costs were determined by using the Bureau of Reclamation's "Construction Cost Trends" report, specifically the "Composite Trend," "machinery and equipment" and "Federal Salary" data. Six years without an O&M rate adjustment, and the lack of adequate rate relief in earlier years have resulted in a serious shortage of

adequate funding for preventive and repair maintenance in accordance with industry standards. During the six years of stable rates, there was a 17 percent increase in Project operation costs to include cost of living increases for salaries. Two-thirds of the proposed O&M rate adjustment would be to meet inflation; the remaining one-third is to fund the preventive maintenance program of the irrigation system. The \$2.90 increase for 1998 will help offset the lack of adequate rate relief for previous years, and thus enable the Project to meet demonstrated maintenance needs. The increase over subsequent years will only compensate for expected inflation each year. The percentage increases are 3.4 percent, 3.3 percent, 3.2 percent for 1999, 2000, and 2001, respectively. Given these circumstances and the resulting project needs, the BIA finds the magnitude of the increase to be reasonable.

Comments regarding access to budget: The water users request access to the Project's budget and to have input into what needs to be done and where the money is going.

Response: The Project annually mails over 1,100 O&M bills to all of the Project's water users. The cost to mail a copy of the budget to each water user is not cost effective due to reproduction and postal costs. Therefore, the annual budget for O&M is available at the Project Office, Crow Agency, Montana for review by the water users and the general public. For this proposed rate adjustment, the Project held a public meeting on September 12, 1997, to discuss the proposed rate adjustment and to present the Project budget. The participants at the meeting were provided copies of the proposed rate adjustment and the Project budget.

Prior to the above-mentioned public meeting, the Project met with the three irrigation districts associated with the Project on January 3, 1997. At this annual district meeting, the Project presented its 1998 budget. This meeting provided attendees to provide comment on the Project's budget and the need for a rate adjustment for the 1998 irrigation season.

Comments regarding the efficiency of the Project operation: The Project needs to develop plans for a systematic cleaning of canals and laterals, removal of unwanted pond weed, increase its efficiency, as present funds are underutilized.

Response: Maximizing the Project's efficiency is certainly a goal of the Project, and the Project will continue its efforts toward improving efficiency in its operations. However, to keep water moving through an irrigation delivery

system effectively and reliably requires that the canals and laterals be continually re-sloped, excess vegetation removed, structures repaired or replaced, and aquatic weed controlled. To accomplish this the Project requires that heavy equipment operators travel along the canal or lateral and re-slope and remove excessive vegetation with an excavator. The heavy equipment used to accomplish this also requires continual maintenance and repair. To accomplish aquatic weed control, the Project is restricted by environmental and public safety requirements. Chemicals used for these purposes must be approved. In recent years, these costs have increased both due to the increased cost of the chemicals and the manner in which they are applied.

The Project has maintained an O&M rate of \$11.60 per acre since 1992. The Project over the years has had to cut back on maintenance programs to keep the O&M costs within the \$11.60 per acre assessment. To continue operating the project at a \$11.60 per acre assessment would require further cuts of maintenance, further jeopardizing the operation of the Project. The proposed rate adjustments will provide the Project with adequate revenue to increase the maintenance program from the present level of 30 to 40 of the 3040 structures per year up to 50 to 60 structures per year, increase canal maintenance from its current level of 30 to 35 miles per year to 50 to 55 per year, and replace worn-out heavy equipment. The BIA finds that the proposed rate will help improve project efficiency.

Comments regarding the supervision of Project personnel: Comments stated concerns that field project personnel are unsupervised, unproductive, lack the knowledge of structures, maintenance, etc.

Response: The supervision of field irrigation personnel rests with the Project Manager. To assist the manager, there are one supervisory civil engineer technician, three equipment operators, two lead irrigation system operators, and four irrigation system operators. Any complaints a water user may have with any of the irrigation personnel should be reported in writing to the Project Manager, Crow Agency Superintendent or the Area Director, Billings Area Office. Any written complaints should contain information that identifies a situation in sufficient detail so that an inquiry may be conducted. In addition, the complaint must include the complainant's name, address, and telephone number.

The responsibility for the repair and/or replacement of the water delivery system structures lies with the Project

Manager and Supervisory Civil Engineer Technician. They have the required experience and expertise to effect repairs or replacement of Project structures. They also can rely on the BIA's Billings Area Office staff or the Bureau of Reclamation Regional Office staff for additional technical assistance that may be needed to accomplish the Project's maintenance program. The BIA finds that any complaints with Project personnel should be raised to the Project Manager or the Area Director; and do not form the basis here for contesting the rate adjustment.

Comments regarding the publication of the proposed rate increase:

Comments expressed concerns that the publication of the proposed rate adjustment should have been before or after a harvest season.

Response: The Project operates on a fiscal year cycle from October 1 through September 30 of each year and is required to submit a proposed budget for any given year to the Billings Area Office during the previous fiscal year. The Project submitted its request for a proposed rate adjustment for 1998 to the Billings Area Office in May 1997. The Billings Area Office approved the proposed rate adjustment and submitted it to the BIA Central Office, Washington, D.C., for final approval and publication in the **Federal Register**. On August 25, 1997 (62 FR 44991), the **Federal Register** published the proposed O&M rate. All interested parties were given 30 days to submit written comments.

To ensure the water users were aware, the Project was proposing an O&M rate adjustment. The Project posted copies of the **Federal Register** Notice at all federal facilities within its area. In addition to this posting, the Project also announced a public meeting to solicit comments from the public regarding the proposed O&M rate adjustment. This meeting was held on September 12, 1997.

The BIA will review its process for notifying the public for proposed rate adjustments, and will strive to avoid the harvest season in future rate adjustments.

Conclusion

Following review of the Project record and the comments received, the BIA determined that the overall and compelling need for the Project to bring its budget to current financial levels; thus, properly maintaining the Project facilities and rendering the proposed rate adjustment both necessary and reasonable. While we have considered the objections of the water users, we affirm the Project's proposed budgets and issue this final rate notice. Specific concerns expressed by the water users

as to the time of the proposed rate adjustments and requesting access to and input in the budgetary process, will be accommodated more fully in future rate adjustment situations.

Executive Order 12988

The Department has certified to the Office of Management and Budget (OMB) that this rate adjustment meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 12866

This rate adjustment is not a significant regulatory action and has been reviewed by the Office of

Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

This rate making is not a rule for the purposes of the Regulatory Flexibility Act because it is "a rule of particular applicability relating to rates." 5 U.S.C. 601(2).

Executive Order 12630

The Department has determined that this rate adjustment does not have significant "takings" implications.

Executive Order 12612

The Department has determined that this rate adjustment does not have

significant Federalism effects because it pertains solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of states.

Unfunded Mandates Act of 1995

This rate adjustment imposes no unfunded mandates on any governmental or private entity and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

Rate Adjustment

The following table illustrates the impact of the rate adjustment:

CROW IRRIGATION PROJECT—IRRIGATION RATE PER ASSESSABLE ACRE

Year	1997	1998	1999	2000	2001
Rate	\$11.60	\$14.50	\$15.00	\$15.50	\$16.00

Dated: May 11, 1999.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 99-12387 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-02-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA-066-1430-01; CACA-12720]

Opening Order

AGENCY: Bureau of Land Management.
ACTION: Termination of Recreation and Public Purposes Classification and Opening Order, San Diego County, California.

SUMMARY: This notice terminates the existing Recreation and Public Purposes Classification and opens the affected lands to disposal by exchange.

EFFECTIVE DATE: Immediately upon publication.

FOR FURTHER INFORMATION CONTACT: Diane Gomez, Palm Springs-South Coast Field Office, BLM, P.O. Box 1260, North Palm Springs, CA 92258-1260, (760) 251-4852.

SUPPLEMENTAL INFORMATION: On April 28, 1983, the land described below was classified as suitable for lease or sale pursuant to the Recreation and Public Purposes (R&PP). No R&PP development has occurred, therefore the R&PP classification is hereby terminated to allow other uses consistent with planning and current land classification. The lands are opened only to disposal by exchange pursuant to section 206 of the Federal Land Policy and

Management Act of 1976 (43 U.S.C. 1716):

San Bernardino Meridian, California

T. 13 S., R. 3 W., Sec: 23, SW¹/₄SW¹/₄NE¹/₄, NW¹/₄NW¹/₄SE¹/₄, S¹/₂NW¹/₄SE¹/₄, Containing 40.00 acres.

Dated: May 12, 1999.

James G. Kenna,

Field Office Manager.

[FR Doc. 99-12444 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-40-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-050-99-1430-01; AZA 25991]

Arizona: Notice of Realty Action; Bureau Motion Recreation and Public Purposes Classification; La Paz County, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The following public land in the Town of Quartzsite, Arizona, has been examined and found suitable for classification for lease or conveyance under the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 *et seq.*):

Gila and Salt River Meridian, Arizona

T. 4 N., R. 19 W.,

Sec. 15, E¹/₂, N¹/₂NW¹/₄, N¹/₂S¹/₂NW¹/₄, N¹/₂SW¹/₄SW¹/₄NW¹/₄, SE¹/₄SE¹/₄NW¹/₄, NE¹/₄NE¹/₄SW¹/₄, S¹/₂N¹/₄SW¹/₄, N¹/₂SW¹/₄SW¹/₄, SE¹/₄SW¹/₄;

Sec. 17, all;

Sec. 20, N¹/₂, SW¹/₄, N¹/₂SE¹/₄, SW¹/₄SE¹/₄, N¹/₂SE¹/₄SE¹/₄, SW¹/₄SE¹/₄SE¹/₄, S¹/₂SE¹/₄SE¹/₄SE¹/₄;

Sec. 21, W¹/₂NE¹/₄, N¹/₂NW¹/₄, N¹/₂SW¹/₄NW¹/₄, NE¹/₄SE¹/₄NW¹/₄, S¹/₂S¹/₂NW¹/₄ excluding 23.969 acres under Recreation and Public Purposes classification and lease AZA 22501;

Sec. 22, lot 1, N¹/₂NE¹/₄, N¹/₂SW¹/₄NE¹/₄, SE¹/₄SW¹/₄NE¹/₄, SE¹/₄NE¹/₄, SE¹/₄SE¹/₄;

Sec. 23, N¹/₂, SE¹/₄SW¹/₄SW¹/₄, N¹/₂SE¹/₄, N¹/₂S¹/₂SE¹/₄, N¹/₂SW¹/₄SW¹/₄SE¹/₄, SE¹/₄SW¹/₄SW¹/₄SE¹/₄, SE¹/₄SE¹/₄SW¹/₄SE¹/₄, E¹/₂SW¹/₄SE¹/₄SE¹/₄, W¹/₂SE¹/₄SE¹/₄SE¹/₄;

Sec. 26, S¹/₂NE¹/₄NE¹/₄NE¹/₄NE¹/₄, W¹/₂NE¹/₄NE¹/₄NE¹/₄, SE¹/₄NE¹/₄NE¹/₄NE¹/₄, E¹/₂NW¹/₄NE¹/₄NE¹/₄, S¹/₂NW¹/₄NW¹/₄NE¹/₄NE¹/₄, SW¹/₄NW¹/₄NE¹/₄NE¹/₄, NE¹/₄NE¹/₄NW¹/₄NE¹/₄, S¹/₂NE¹/₄NW¹/₄NE¹/₄, NE¹/₄NW¹/₄NW¹/₄NE¹/₄, S¹/₄NW¹/₄NW¹/₄NE¹/₄, S¹/₂N¹/₂NE¹/₄, S¹/₂NE¹/₄, S¹/₂NE¹/₄NE¹/₄NW¹/₄, W¹/₂NE¹/₄NW¹/₄, SE¹/₄NE¹/₄NW¹/₄, SE¹/₄NW¹/₄;

Sec. 28, E¹/₂NW¹/₄SE¹/₄, S¹/₂NW¹/₄NW¹/₄SE¹/₄, SW¹/₄NW¹/₄SE¹/₄;

Sec. 29, W¹/₂SW¹/₄NE¹/₄NE¹/₄.

The areas described aggregate 3,023.05 acres, more or less.

SUPPLEMENTARY INFORMATION: This action is a motion by the Bureau of Land Management to make available land to support community expansion. This land is identified in the Yuma District Resource Management Plan, as amended, as having potential for disposal. Lease or conveyance of the land for recreational or public purposes would be in the public interest.

Lease or conveyance of the land will be subject to the following terms, conditions, and reservations:

1. Provisions of the Recreation and Public Purposes Act and all applicable regulations of the Secretary of the Interior.

2. Rights-of-way for ditches and canals constructed by the authority of the United States.

3. All valid existing rights documented on the official public land records at the time of lease/patent issuance.

4. All minerals shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals.

5. Any other reservations that the authorized officer determines appropriate to ensure public access and proper management of Federal lands and interests therein.

Upon publication of this notice in the **Federal Register**, the land will be segregated from all forms of appropriation under the public land laws, including the general mining laws, except for lease or conveyance under the Recreation and Public Purposes Act and leasing under the mineral leasing laws.

DATES: By July 2, 1999, interested persons may submit comments regarding the proposed classification of the land to the Field Manager, Yuma Field Office, 2555 E. Gila Ridge Road, Yuma, Arizona 85365, (520) 317-3200. Any adverse comments will be reviewed by the State Director. In the absence of any adverse comments, the classification will become effective on July 19, 1999.

Upon the effective date of classification, the land will be open to the filing of an application under the Recreation and Public Purposes Act by any interested, qualified applicant. If, after 18 months following the effective date of classification, an application has not been filed, the segregative effect of the classification shall automatically expire and the lands classified shall return to their former status without further action by the authorized officer.

FOR FURTHER INFORMATION CONTACT: Debbie DeBock, Realty Specialist, Bureau of Land Management, address above, telephone (520) 317-3208.

Dated: May 12, 1999.

Gail Acheson,

Field Manager, Yuma.

[FR Doc. 99-12445 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-32-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR-026-09-1220-00: GP9-0182]

Establishment of a Moratorium on the Number of Commercial Outfitting Permits for the Public Land Administered by the BLM, Burns District; Designation Order; Moratorium on Commercial Outfitting Permits for the Burns District

AGENCY: Bureau of Land Management (BLM), Burns District, Portions of the Andrews and Three Rivers Resource Area, Burns, Oregon.

SUMMARY: The BLM, Burns District will conduct an environmental review which will analyze various alternatives, and address numerous issues concerning resource protection, recreation opportunities, and number of Special Recreation Permits (SRPs) issued by BLM, Burns District.

BLM has determined that a moratorium on the number of commercial outfitting permits is needed to hold commercial use at the existing 1999 levels, until the environmental review and analysis is completed.

By placing a moratorium on commercial permits for the District, this will allow BLM to collect baseline data, provide strategies for determining thresholds, and assess the kind of outfitter/guides and the services that they provide to the public. This environmental review will be specific to commercial outfitting and big game hunting.

The moratorium will go into effect immediately and remain in effect until the final environmental review is approved. Only those commercial outfitters that have a current SRP for the BLM, Burns District, as of May 1, 1999, will be allowed to apply in future years until the environmental review is final.

When the environmental review is approved, the moratorium will be lifted and constraints on the number of outfitting permits, kind of outfitters authorized associated with recreational activities, area of use, number of user days, if any, will be implemented.

Sales of outfitting businesses and any transfer of permits that may apply during the period of moratorium will be dealt with through BLM Recreation Permit Administration, Manual/Policy Statement and User Guide.

EFFECTIVE DATE: June 15, 1999.

FOR FURTHER INFORMATION CONTACT: Additional information concerning this moratorium on commercial outfitting permits in the Burns District may be

obtained from Fred McDonald, Natural Resource Specialist, Burns District Office, HC 74-12533 Highway 20 West, Hines, Oregon 97738, (541) 573-4453, or Fred_McDonald@blm.gov.

Authority: For implementing this action is contained in 43 CFR part 8372.

Dated: May 10, 1999.

Thoams H. Dyer,

District Manager.

[FR Doc. 99-12496 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-33-M

DEPARTMENT OF THE INTERIOR

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before May 8, 1999.

Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, 1849 C St. NW, NC400, Washington, DC 20240. Written comments should be submitted by June 2, 1999.

Carol D. Shull,

Keeper of the National Register.

COLORADO

Montezuma County

Archeological site no. 5MT4700 (Great Pueblo Period of the McElmo Drainage Unit MPS), Address Restricted, Yellow Jacket vicinity, 99000685

Bass Site (Great Pueblo Period of the McElmo Drainage Unit MPS), Address Restricted, Yellow Jacket vicinity, 99000654

Seven Towers Pueblo (Great Pueblo Period of the McElmo Drainage Unit MPS), Address Restricted, Yellow Jacket vicinity, 99000653

Woods Canyon Pueblo (Great Pueblo Period of the McElmo Drainage Unit MPS), Address Restricted, Yellow Jacket vicinity, 99000652

FLORIDA

Marion County

Ocala Historic Commercial District, Roughly bounded by 1st St. NW, 1st Ave. SE, 2nd St. SW, and 1st Ave. SW, Ocala, 99000656

GEORGIA

Fannin County

Baugh, James W., Homeplace, Jct. of W. First St. and Messer St., Blue Ridge, 99000658

Muscogee County

Forston House, 1100 Forston Rd., Forston, 99000657

MASSACHUSETTS**Middlesex County**

Hosmer Homestead, 138 Baker Ave.,
Concord, 99000659

Worcester County

Gardner Uptown Historic District, Roughly
along Central, Cross, Elm, Green, Glazier,
Pearl and Woodland Sts., Gardner,
99000660

MISSOURI**Franklin County**

New Haven Residential Historic District,
Roughly along Wall St. and Maupin Ave.,
and bounded by Washington and Bates
Sts., New Haven, 99000661

Lewis County

Gray, William, House (La Grange, Missouri
MPS), 407 Washington, La Grange,
99000666

Hay, Dr. J.A., House (La Grange, Missouri
MPS), 406 W. Monroe St., La Grange,
99000664

McKoon, John, House (La Grange, Missouri
MPS), 500 W. Monroe St., La Grange,
99000665

Rhoda, Fred, House (La Grange, Missouri
MPS), 200 S. Second St., La Grange,
99000662

Waltman, A.C., House (La Grange, Missouri
MPS), 302 Lewis St., La Grange, 99000663

NEW HAMPSHIRE**Hillsborough County**

Francestown Meetinghouse, Rte 136,
Francestown, 99000667

Rockingham County

Little Boar's Head Historic District, Parts of
Atlantic Ave., Chapel Rd., Ocean Blvd.,
Sea Rd., and Willow Ave., North Hampton,
99000668

NEW YORK**Tompkins County**

First Presbyterian Church of Ulysses, Main
St., Trumansburg, 99000669

NORTH CAROLINA**Mecklenburg County**

McNinch, Frank Ramsay, House, 2727
Sharon Ln., Charlotte, 99000670

OKLAHOMA**Craig County**

First Methodist-Episcopal Church, South,
314 W. Candian Ave., Vinita, 99000673

Lincoln County

National Guard Statistical Building, Park Rd.,
1 blk W of 6th St., Chandler, 99000672

Oklahoma County

Smith and Kernke Funeral Directors, 1401
NW 23rd St., Oklahoma City, 99000671

PENNSYLVANIA**Delaware County**

Pennsylvania Railroad Station at Wayne, Jct.
of N. Wayne Ave. and Station Rd., Wayne,
99000674

RHODE ISLAND**Newport County**

Horsehead—Marbella, 240 Highland Dr.,
Jamestown, 99000675

SOUTH DAKOTA**Custer County**

Archeological site no. 39CU1619, Address
Restricted, Custer vicinity, 99000679

Gregory County

Mitchell West Central Residential Historic
District, Roughly bounded by First and
Seventh Aves., Mitchell, 99000676
Tackett Underwood Building, Address
Restricted, Gregory vicinity, 99000678

Jerauld County

Wessington Springs Carnegie Library
(Historic Bridges in South Dakota MPS) 124
N. Main Ave., Wessington Springs,
99000677

Minnehaha County

Palisades Bridge
(Historic Bridges in South Dakota MPS),
25495 485th Ave., Garretson, 99000687

Walworth County

Walworth County Courthouse
(County Courthouses of South Dakota MPS),
4304 4th Ave., Selby, 99000680

VIRGINIA**Franklin County**

Rocky Mount Historic District, Roughly
bounded by Franklin, and Maynor Sts.;
Floyd Ave.; E. Court St; and Maple Ave.,
Rocky Mount, 99000683

York County

Old Custom House, Jct. of Main and Read
Sts., Yorktown, 99000682

WISCONSIN**Forest County**

Otter Spring House, Approx. 80 meters S of
Spring Pond Rd., Lincoln vicinity,
99000684

A Request for a Move has been made for
the following resource:

WISCONSIN**Dane County**

Crosse, Dr. Charles G., House 133 W. Main
St., Sun Prairie, 93000029

A Request for a Removal has been made for
the following resource:

INDIANA**Vermillion County**

Brouillets Creek Covered Bridge, Co. Rds
100 W and 1700S over Brouillets Cr.,
Clinton 94000586

A Correction is hereby made for the
following resource:

For Technical reasons this nomination
should not have been published and is no
longer considered a pending National
Register of Historic Places Nomination.

NORTH CAROLINA**Carteret County**

Cape Lookout Village Historic District, Cape
Lookout, from Lighthouse to Cape Point,
Harkers Island, 99000599

[FR Doc. 99-12403 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-70-U

DEPARTMENT OF THE INTERIOR**Bureau of Reclamation**

**Intent to Solicit Comments on the
Development of Surplus Criteria for
Management of the Colorado River and
to Initiate National Environmental
Policy Act (NEPA) Process**

AGENCY: Bureau of Reclamation,
Interior.

ACTION: Notice to solicit comments and
initiation of NEPA process.

SUMMARY: The Department of the
Interior, Bureau of Reclamation
(“Reclamation”), is considering
development of specific criteria that
will identify those circumstances under
which the Secretary of the Interior
(“Secretary”) may make Colorado River
water available for delivery to the States
of Arizona, California, and Nevada
(Lower Division States or Lower Basin)
in excess of the 7,500,000 acre-foot
Lower Basin apportionment.

DATES: We must receive all comments at
the address below on or before June 30,
1999. In addition to accepting written
comments, we will hold public scoping
meetings prior to the closing of the
comment period. We will hold the
public scoping meetings to allow the
public to comment on the need for, and
content of, specific surplus criteria as
part of the National Environmental
Policy Act (NEPA) process initiated by
this notice. We will notify you of the
dates, times, and places for these
meetings through the **Federal Register**,
media outlets, and to all respondents to
this notice.

ADDRESSES: You may submit comments
to the Regional Director, Lower
Colorado Region, Attention: Jayne
Harkins, Bureau of Reclamation, P.O.
Box 61470, Boulder City, Nevada
89006-1470.

SUPPLEMENTARY INFORMATION: The
Secretary, pursuant to the Boulder
Canyon Project Act of December 28,
1928, and the Supreme Court opinion
rendered June 3, 1963, and decree
entered March 9, 1964 (Decree), in the
case of *Arizona v. California, et al.*, is
vested with the responsibility to manage
the mainstream waters of the Colorado
River in the Lower Basin. As the agency

that has been designated to act in the Secretary's behalf with respect to these matters, Reclamation intends to scope and, if appropriate, to develop and implement specific criteria under which "surplus" determinations will be made for the Lower Basin States.

Currently, each year, the Secretary establishes an Annual Operating Plan (AOP) for the Colorado River Reservoirs. The AOP describes how Reclamation will manage the reservoirs over a twelve month period, consistent with the "Criteria for Coordinated Long-Range Operation of the Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968" (Long-Range Operating Criteria) and the Decree. Reclamation consults annually with the Colorado River Basin States, Indian Tribes, and other interested parties in the development of the AOP. Further, as part of the AOP process, the Secretary makes annual determinations under the Long-Range Operating Criteria, regarding the availability of Colorado River water for deliveries to the Lower Division States. To meet the consultation requirements of federal law, Reclamation also consults with the Colorado River Basin States, Indian Tribes, and other interested parties during the five-year periodic reviews of the Long-Range Operating Criteria.

In recent years, demand for Colorado River water in Arizona, California, and Nevada has exceeded the Lower Basin's 7,500,000 acre-foot basic apportionment. As a result, criteria for determining the availability of surplus has become a matter of increased importance. Under these circumstances, the Secretary believes that it may be prudent to develop specific criteria that will guide the Secretary's annual decision regarding the quantity of Colorado River water available for delivery to the Lower Basin States. Such surplus criteria would provide more predictability to States and water users. Reclamation anticipates however, that surplus criteria will be subject to change based upon new circumstances, and that such criteria may be interim in nature.

Reclamation may implement the surplus criteria by revising the Long-Range Operating Criteria set forth in Article III(3) or by developing interim implementing criteria pursuant to Article III(3) of the Long-Range Operating Criteria. Proceeding under Article III(3) may be particularly appropriate because Section 602 of the Colorado River Basin Project Act, as amended, requires that any modification to the Long-Range Operating Criteria be made "only after correspondence with the Governors of the seven Colorado

River Basin States and appropriate consultation with such state representatives as each Governor may designate." This statutory reference to the special role of the Basin States in matters relating to the Long-Range Operating Criteria underscores the importance of working closely with the states in developing surplus criteria. Reclamation intends to appropriately coordinate the development of surplus criteria with the Basin States, in accordance with this mandate. In that regard, Reclamation recognizes that efforts are currently underway to reduce California's reliance on surplus deliveries.

Reclamation will take account of progress in that effort, or lack thereof, in the decision-making process regarding specific surplus criteria. Reclamation also intends to make full use of technical information and approaches that have been developed through ongoing discussions with the Basin States. This information can be obtained through the Reclamation contact listed above.

As part of the process initiated by this notice, Reclamation will analyze the effects of specific surplus criteria on potential future shortage determinations on the Colorado River. The criteria would be consistent with relevant Federal law, and would recognize relevant provisions of the Law of the River, which has evolved out of a combination of Federal and State statutes, interstate compacts, court decisions and decrees, an international treaty, contracts with the Secretary, operating criteria, regulations, and administrative decisions.

Reclamation will utilize a public process pursuant to NEPA during the development of the surplus criteria. By this notice, Reclamation invites all interested parties, including the Colorado River Basin States, Indian Tribes, water users, members of the general public, organizations, and agencies to present written comments concerning the format for the criteria, the scope of specific surplus criteria, and the issues and alternatives that they suggest should be analyzed. As noted above, Reclamation will integrate the consultation requirements of Section 602 of the Colorado River Basin Project Act, as amended, into the NEPA process initiated by this notice. As part of this review, Reclamation will consult with state representatives of each of the Governors of the seven Colorado River Basin States, Indian Tribes, members of the general public, representatives of academic and scientific communities, environmental organizations, the recreation industry and contractors for

the purchase of Federal power produced at Glen Canyon Dam.

Dated: May 13, 1999.

David J. Hayes,

Acting Deputy Secretary.

[FR Doc. 99-12491 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-94-P

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Overseas Private Investment Corporation

Submission for OMB Review; Comment Request

AGENCY: Overseas Private Investment Corporation, IDCA.

ACTION: Request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), Agencies are required to publish a Notice in the **Federal Register** notifying the public that the Agency has prepared an information collection request for OMB review and approval and has requested public review and comment on the submission. OPIC published its first Federal Register Notice on this information collection request on March 5, 1999, in 64 FR #43, p. 10721, at which time a 60-calendar day comment period was announced. This comment period ended May 5, 1999. No comments were received in response to this Notice.

This information collection submission has now been submitted to OMB for review. Comments are again being solicited on the need for the information, its practical utility, the accuracy of the Agency's burden estimate, and on ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form under review is summarized below.

DATES: Comments must be received on or before June 17, 1999.

ADDRESSES: Copies of the subject form and the request for review submitted to OMB may be obtained from the Agency Submitting Officer. Comments on the form should be submitted to the OMB Reviewer.

FOR FURTHER INFORMATION CONTACT:

OPIC Agency Submitting Officer: Carol Brock, Records Manager, Overseas Private Investment Corporation, 1100 New York Avenue, N.W., Washington, D.C. 20527; 202 336-8563.

OMB Reviewer: Jeff Hill, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Docket

Library, Room 10102, 725 17th Street, N.W., Washington, D.C. 20503, 202/395-5871.

Summary of Form Under Review

Type of Request: New form.

Title: Client Year 2000 Program

Assessment Checklist.

Form Number: OPIC-230.

Frequency of Use: Once per project.

Type of Respondents: Business or other institutions (except farms).

Standard Industrial Classification

Codes: All.

Description of Affected Public: U.S. companies or citizens investing overseas.

Reporting Hours: 1 hour per project.

Number of Responses: 500 per year.

Federal Cost: \$5,000 per year.

Authority for Information Collection: Year 2000 Information and Readiness Disclosure Act of 1998.

Abstract (Needs and Uses): OPIC is surveying its clients to determine their status on addressing Year 2000 issues to ensure that OPIC's clients will be able to continue to make payments of premiums, principal, interest, and fees due to OPIC. The continued flow of these payments helps OPIC to ensure a positive cash flow and maintain its position as a self-sustaining agency.

Dated: May 12, 1999.

James R. Offutt,

Assistant General Counsel, Department of Legal Affairs.

[FR Doc. 99-12463 Filed 5-17-99; 8:45 am]

BILLING CODE 3210-01-M

INTERNATIONAL TRADE COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: May 24, 1999 at 2:00 p.m.

PLACE: Room 101, 500 E Street S.W., Washington, DC 20436, Telephone: (202) 205-2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: none.
2. Minutes.
3. Ratification List.
4. Inv. No. 731-TA-244

(Review)(Natural Bristle Paint Brushes from China)—briefing and vote. (The Commission will transmit its determination to the Secretary of Commerce on June 3, 1999.)

5. Inv. No. 731-TA-805 (Final)(Elastic Rubber Tape from India)—briefing and vote.

6. Inv. Nos. 751-TA-21-27 (Ferrosilicon from Brazil, China,

Kazakhstan, Russia, Ukraine, and Venezuela)—briefing and vote.

7. Outstanding action jackets:

(1.) Document No. INV-99-077:

Institution of five-year reviews on Certain Industrial Belts, Industrial Nitrocellulose, Steel Rails, Drafting Machines, Small Business Telephone Systems, Mechanical Transfer Presses, Multiangle Laser Light-Scattering Instruments, and Benzyl Paraben.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: May 13, 1999.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 99-12555 Filed 5-14-99; 11:53 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE

Office of Community Oriented Policing Services; Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Notice of Information Collection Under Review; (Reinstatement, without change, of a previously approved collection for which approval has expired.

COPS MORE '98 28 CFR Part 23 Certification

The Department of Justice, Office of Community Oriented Policing Services, has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. This proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until July 19, 1999.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Karen Beckman, Research Analyst, Office of Community Oriented Policing Services, U.S. Department of Justice, 1100 Vermont Avenue NW, Washington, DC 20530. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the

agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Written comments and/or suggestions regarding the items contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, D.C. 20530. Additionally, comments may be submitted to OMB via facsimile to 202-395-7285. Comments may also be submitted to the Department of Justice (DOJ), Justice Management Division, Information Management and Security Staff, Attention: Department Deputy Clearance Officer, Suite 850, 1001 G Street, NW, Washington, D.C. 20530.

Written comments may also be submitted to Nina S. Pozgar, General Counsel, Office of Community Oriented Policing Services, 1100 Vermont Avenue, N.W., Washington, D.C. 20530, or via facsimile at (202) 514-3456.

Overview of this information collection:

(1) *Type of Information Collection:* Reinstatement.

(2) *Title of the Form/Collection:* COPS MORE '98 28 CFR Part 23 Certification.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form: COPS 25/01. Office of Community Oriented Policing Services, U.S. Department of Justice.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: This information collection is necessary to establish that each grantee that has received funding under COPS MORE '98 grant programs is wither in compliance with the operating principles set forth in 28 CFR 23.20 or that the regulation is not applicable.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* COPS MORE '98 CFR Part 23 Certification: Approximately 1,760 respondents, at 5 hours 10 minutes per respondent (including record-keeping).

(6) *An estimate of the total public burden (in hours) associated with the collection:* Approximately 9,094 hours.

If additional information is required contact: Ms. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530.

Dated: May 12, 1999.

Brenda E. Dyer,

Department Deputy Clearance Officer, United States Department of Justice.

[FR Doc. 99-12435 Filed 5-17-99; 8:45 am]

BILLING CODE 4410-AT-M

DEPARTMENT OF JUSTICE

National Institute of Justice

[OJP (NIJ)-1227]

RIN 1121-ZB60

Announcement of the Availability of the National Institute of Justice Solicitation for Basic Research on Violence Against Women

AGENCY: National Institute of Justice, Office of Justice Programs, Justice.

ACTION: Notice of Solicitation.

SUMMARY: Announcement of the availability of the National Institute of Justice solicitation "Basic Research on Violence Against Women."

DATES: Due date for receipt of proposals is close of business June 25, 1999.

ADDRESSES: National Institute of Justice, 810 Seventh Street, NW, Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: For a copy of the solicitation, please call NCJRS 1-800-851-3420. For general information about application procedures for solicitations, please call the U.S. Department of Justice Response Center 1-800-421-6770.

SUPPLEMENTARY INFORMATION:

Authority

This action is authorized under the Omnibus Crime Control and Safe Streets Act of 1968, sections 201-03, as amended, 42 U.S.C. 3721-23 (1994).

Background

The National Institute of Justice (NIJ) is soliciting proposals for basic research addressing violence against women. Violence against women includes family and intimate partner violence, sexual assault, stalking, and violence committed by acquaintances and strangers.

NIJ anticipates awarding up to 6 grants with a funding total of \$1,250,000. The duration and the budget for proposed evaluations should be justified by factors such as the complexity of the design, the number of sites, and the size of the sample.

Interested organizations should call the National Criminal Justice Reference Service (NCJRS) at 1-800-851-3420 to obtain a copy of "Basic Research on Violence Against Women" (refer to document no. SL000350). For World Wide Web access, connect to either NIJ at <http://www.ojp.usdoj.gov/nij/funding.htm>, or the NCJRS Justice Information Center at <http://www.ncjrs.org/fedgrant.htm#nij>.

Jeremy Travis,

Director, National Institute of Justice.

[FR Doc. 99-12400 Filed 5-17-99; 8:45 am]

BILLING CODE 4410-18-P

DEPARTMENT OF JUSTICE

Office of Justice Programs; Announcement of the Availability of the National Institute of Justice Solicitation for Researcher-Practitioner Partnerships: Evaluations of Grants to Encourage Arrest Policies for Domestic Violence

National Institute of Justice

[OJP (NIJ)-1228]

RIN 1121-ZB61

AGENCY: National Institute of Justice, Office of Justice Programs, Justice.

ACTION: Notice of Solicitation

SUMMARY: Announcement of the availability of the National Institute of Justice "Researcher-Practitioner Partnerships: Evaluations of Grants to Encourage Arrest Policies for Domestic Violence."

DATES: Due date for receipt of proposals is close of business June 30, 1999.

ADDRESSES: National Institute of Justice, 810 Seventh Street, NW, Washington, DC 20531.

FOR FURTHER INFORMATION CONTACT: For a copy of the solicitation, please call NCJRS 1-800-851-3420. For general information about application procedures for solicitations, please call the U.S. Department of Justice Response Center 1-800-421-6770.

SUPPLEMENTARY INFORMATION:

Authority

This action is authorized under the Omnibus Crime Control and Safe Streets Act of 1968, sections 201-03, as amended, 42 U.S.C. 3721-23 and 42 U.S.C. 3796hh (1994).

Background.

The National Institute of Justice (NIJ), in collaboration with the Office of Justice Programs' Violence Against Women Office (VAWO), is soliciting proposals for researcher-practitioner partnerships to evaluate practitioner collaborations through the Grants to Encourage Arrest Policies under the Violence Against Women Act (VAWA), 42 U.S.C. 3796hh. The purpose of these researcher-practitioner partnerships is to provide jurisdictions receiving funds under the Grants to Encourage Arrest with the resources to implement locally based evaluations that are responsive to the needs of the jurisdiction and that contribute to our understanding of the issues nationally. Specifically, this solicitation provides support for locally conducted process evaluations of projects supported by the Grants to Encourage Arrest. The process evaluations should provide a thorough descriptive analysis of the issues being addressed by the project and the activities undertaken in formulating the project.

Evaluation teams should include researchers, practitioners and victim advocates. The teams may focus on issues related to any of the program purposes or the Special Interest Categories of the Grants to Encourage Arrest Policies.

Evaluations will be supported by cooperative agreements between the grantee and NIJ. NIJ, with input from VAWO, will consult with awardees concerning the nature of the collaboration, the specific research issue to be addressed as part of the collaboration, research approach, and other factors.

Researcher-practitioner process evaluations will be funded at up to \$75,000 each for up to 18 months. It is anticipated that up to six awards will be made available for evaluations in individual jurisdictions.

Interested organizations should call the National Criminal Justice Reference Service (NCJRS) at 1-800-851-3420 to obtain a copy of "Researcher-Practitioner Partnerships: Evaluations of Grants to Encourage Arrest Policies for Domestic Violence" (refer to document no. SL000349). For World Wide Web access, connect either to NIJ at <http://www.ojp.usdoj.gov/nij/funding.htm>, or the NCJRS Justice Information Center at <http://www.ncjrs.org/fedgrant.htm#nij>.

Jeremy Travis,

Director, National Institute of Justice

[FR Doc. 99-12401 Filed 5-17-99; 8:45 am]

BILLING CODE 4410-18-P

DEPARTMENT OF JUSTICE**National Institute of Justice**

[OJP (NIJ)-1229]

RIN 1121-ZB62

Announcement of the Availability of the National Institute of Justice Solicitation for National Impact Evaluation of Victim Service Programs Funded Through the S.T.O.P. Violence Against Women Formula Grants Program**AGENCY:** National Institute of Justice, Office of Justice Programs, Justice.**ACTION:** Notice of solicitation.**SUMMARY:** Announcement of the availability of the National Institute of Justice "National Impact Evaluation of Victim Service Programs Funded Through the S.T.O.P. Violence Against Women Formula Grants Program."**DATES:** Due date for receipt of proposals is close of business July 1, 1999.**ADDRESSES:** National Institute of Justice, 810 Seventh Street, NW., Washington, DC 20531.**FOR FURTHER INFORMATION CONTACT:** For a copy of the solicitation, please call NCJRS 1-800-851-3420. For general information about application procedures for solicitations, please call the U.S. Department of Justice Response Center 1-800-421-6770.**SUPPLEMENTARY INFORMATION:****Authority**

This action is authorized under the Omnibus Crime Control and Safe Streets Act of 1968, § 201-03, as amended, 42 U.S.C. 3721-23 (1994).

Background

NIJ is soliciting proposals for an impact evaluation of victim programs and services funded under the S.T.O.P. Violence Against Women Formula Grants Program, administered by the Office of Justice Programs, Violence Against Women Office (VAWO). Specifically, the evaluation should address impact issues regarding nonprofit, nongovernmental victim service programs funded through the S.T.O.P. Program.

The two main objectives of the S.T.O.P. Victim Service Programs Impact Evaluation are to provide a process and impact evaluation of the FY95 to FY98 nonprofit, nongovernmental victim service programs; and to inform policy and practice in order to enhance victim service programs and models of service delivery.

One grant of up to \$800,000 will be awarded in Fiscal Year 1999. The duration of the impact evaluation is up to 36 months with reports of evaluation results to be submitted annually. Applicants should include with their proposal a statement on the additional work that would be completed, the time period for completion of this work, and the funds requested, if the project were to be extended beyond 36 months and additional financial support provided.

Interested organizations should call the National Criminal Justice Reference Service (NCJRS) at 1-800-851-3420 to obtain a copy of "National Impact Evaluation of Victim Service Programs Funded Through the S.T.O.P. Violence Against Women Formula Grants Program" (refer to document no. SL000351). For World Wide Web access, connect either to either NIJ at <http://www.ojp.usdoj.gov/nij/funding.htm>, or the NCJRS Justice Information Center at <http://www.ncjrs.org/fedgrant.htm#nij>.

Jeremy Travis,*Director, National Institute of Justice.*

[FR Doc. 99-12402 Filed 5-17-99; 8:45 am]

BILLING CODE 4410-18-P

LIBRARY OF CONGRESS**Copyright Office**

[Docket No. 97-1 CARP SD 92-95]

Distribution of 1992, 1993, 1994, and 1995 Satellite Royalty Funds**AGENCY:** Copyright Office, Library of Congress.**ACTION:** Initiation of arbitration.**SUMMARY:** The Librarian of Congress is announcing initiation of the 180-day arbitration period for the proceeding to distribute the 1992-95 satellite carrier compulsory license royalties.**DATE:** Effective May 18, 1999.**ADDRESSES:** All hearings and meetings for the 1992-95 satellite distribution proceeding shall take place in the James Madison Memorial Building, Room LM-414, First and Independence Avenue, S.E., Washington, D.C. 20540.**FOR FURTHER INFORMATION CONTACT:**

David O. Carson, General Counsel, or William J. Roberts, Jr., Senior Attorney, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION:**I. Background**

Section 251.72 of 37 CFR provides:

If the Librarian determines that a controversy exists among the claimants to either cable,

satellite carrier, or digital audio recording devices and media royalties, the Librarian shall publish in the **Federal Register** a declaration of controversy along with a notice of an initiation of an arbitration proceeding. Such notice shall, to the extent feasible, describe the nature, general structure and schedule of the proceeding.

The notice published today fulfills the requirements of § 251.72 for the distribution of satellite carrier compulsory license royalties for the years 1992-95.

On January 31, 1997, the Copyright Office published a notice in the **Federal Register** requesting comment as to the existence of Phase I and/or Phase II controversies concerning the distribution of the 1992, 1993, 1994, and 1995 satellite royalty fees, and in the event that a controversy exists, whether to consolidate the determination of the distribution of the 1992-95 royalty fees into a single proceeding, or to conduct multiple proceedings. 62 FR 4814 (January 31, 1997). The notice also requested that each interested party file a Notice of Intent to Participate, indicating the level of participation for each year, i.e., Phase I, Phase II, or both, with the Office. In response to this notice, the following parties identified the existence of controversies for distribution of the 1992-95 funds: James Cannings;¹ the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. (collectively the Music Claimants); Program Suppliers; CBS, Inc.; ABC, Inc.; Public Television Claimants; Devotional Claimants; Home Shopping Network; Multimedia Entertainment, Inc.; National Broadcasting Company, Inc.; Joint Sports Claimants; and Broadcaster Claimants. All but one party favored consolidating the 1992-95 satellite funds into a single distribution proceeding.

On June 4, 1997, the Office issued an Order consolidating the determination of the distribution of the 1992-95 satellite royalty fees into a single proceeding and announcing the precontroversy discovery schedule for a Phase I proceeding. See Order in Docket No. 97-1 CARP SD 92-95 (June 4, 1997). The June 4, 1997, Order set September 8, 1997, as the beginning of the 45-day precontroversy discovery period, with the initiation of the arbitration set for December 1, 1997. This schedule, however, proved unworkable, so at the request of the parties, the Copyright Office rescheduled the start of the 45-day precontroversy discovery period.

¹ Mr. Cannings identified only a Phase II controversy.

See Order in Docket No. 97-1 CARP SD 92-95 (August 20, 1997). In fact, the Office reset the schedule three times before establishing a schedule which met the needs of all the parties. See also Orders in Docket No. 97-1 CARP SD 92-95 (January 15, 1998, July 20, 1998, and October 15, 1998).

During this time, the parties continued to negotiate among themselves. As a result, all of the Phase I parties, with the exception of Joint Sports Claimants and Program Suppliers, settled their Phase I claims for 15.5% of the total aggregate amount of the satellite royalty fees for the years 1992-95. See Order in Docket No. 97-1 CARP SD 92-95 (December 21, 1998). Thus, the only parties who will appear before the CARP in the current Phase I proceeding are the Joint Sports Claimants and the Program Suppliers. The 45-day precontroversy discovery period for these parties began on January 8, 1999, and proceeded according to the schedule announced in the October 15, 1998, Order. However, the April 5 initiation date set in that schedule has been rescheduled for May 18, 1999, in order to accommodate conflicts in both the arbitrators' and the parties' schedules.

II. Initiation of Proceeding

Pursuant to § 251.72 of 37 CFR, the Copyright Office of the Library of Congress is formally announcing the existence of Phase I controversies to the distribution of satellite carrier compulsory license royalties for 1992, 1993, 1994 and 1995, and is initiating an arbitration proceeding under chapter 8 of title 17 of the United States Code to resolve the distribution of those funds. The arbitration proceeding commences on May 18, 1999, and runs for a period of 180 days. The arbitrators shall file their written report with the Librarian of Congress by November 15, 1999, in accordance with § 251.53 of 37 CFR.

On April 20, 1999, the parties to this proceeding met with the arbitrators for the purpose of setting a schedule for this proceeding. The Office announced the schedule and the arbitrators for the proceeding on May 11, 1999. See 64 FR 25374 (May 11, 1999). Copies of the hearing schedule are available at the Copyright Office upon request.

Dated: May 13, 1999.

David O. Carson,
General Counsel.

[FR Doc. 99-12480 Filed 5-17-99; 8:45 am]

BILLING CODE 1410-33-P

NATIONAL GAMBLING IMPACT STUDY COMMISSION

Meeting

AGENCY: National Gambling Impact Study Commission.

ACTION: Notice of public meeting.

SUMMARY: At its fourteenth regular meeting the National Gambling Impact Study Commission, established under Pub. L. 104-169, dated August 3, 1996, will hear possible presentations from one or more subcommittees; continue its ongoing review of Commission research on economic and social gambling impacts; and deliberate on possible findings and recommendations for the Final Report.

DATES: Wednesday, June 2, 8:30 a.m. to 5:30 p.m. and Thursday, June 3, 8:30 a.m. to 5:30 p.m.

The Commission may enter into Executive Session from 12:00 p.m.-1:30 p.m. on either or both days.

ADDRESSES: The meeting site will be: Barcelona 2, The Renaissance Parc 55, Hotel, 55 Cyril Magnin, San Francisco, California 94102.

Written comments can be sent to the Commission at 800 North Capitol Street, NW, Suite 450, Washington, DC 20002.

STATUS: The meeting will be open to the public both days.

FOR FURTHER INFORMATION CONTACT: For further information contact Craig Stevens at (202) 523-8217 or write to 800 North Capitol St., NW, Suite 450, Washington, DC 20002.

SUPPLEMENTARY INFORMATION: For a complete agenda, please contact the Commission. This information will also be faxed to all individuals on the Commission's fax list and posted on the Commission's web site, www.ngisc.gov.

Craig Stevens,

Communications and Logistic Coordinator.

[FR Doc. 99-12386 Filed 5-17-99; 8:45 am]

BILLING CODE 6802-ET-P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

SUMMARY: The NRC is preparing a submittal to OMB for review of

continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* 10 CFR 9, Public Records.

2. *Current OMB approval number:* 3150-0043.

3. *How often the collection is required:* On occasion.

4. *Who is required or asked to report:* Individuals requesting access to records under the Freedom of Information or Privacy Acts, or to records that are already publicly available in the NRC Public Document Room.

5. *The number of annual respondents:* 13,656.

6. *The number of hours needed annually to complete the requirement or request:* 3459.

7. *Abstract:* 10 CFR Part 9 establishes information collection requirements for individuals making requests for records under the Freedom of Information (FOIA) or Privacy Acts (PA). It also contains requests to waive or reduce fees for searching for and reproducing records in response to FOIA requests; and requests for expedited processing of requests. The information required from the public is necessary to identify the records they are requesting; to justify requests for waivers or reductions in searching or copying fees; or to justify expedited processing.

Submit, by July 19, 1999, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, 2120 L Street, NW (lower level), Washington, DC. OMB clearance requests are available at the NRC worldwide web site (<http://www.nrc.gov/NRC/PUBLIC/OMB/index.html>). The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo. Shelton, U.S. Nuclear

Regulatory Commission, T-6 F33, Washington, DC 20555-0001, by telephone at 301-415-7233, or by Internet electronic mail at BJS1@NRC.GOV.

Dated at Rockville, Maryland, this 12th day of May 1999.

For the Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 99-12493 Filed 5-17-99; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[DOCKET NO. 50-353]

PECO Energy Company; Limerick Generating Station, Unit 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF-85, issued to PECO Energy Company (the licensee), for operation of the Limerick Generating Station (LGS), Unit 2, located in Montgomery and Chester Counties, Pennsylvania.

Environmental Assessment

Identification of the Proposed Action

The proposed action would approve the implementation of a plant modification to support the installation of replacement suction strainers for the emergency core cooling systems (residual heat removal and core spray) pumps at LGS, Unit 2.

The proposed action is in accordance with the licensee's application for amendment dated October 6, 1997, as supplemented by letter dated August 28, 1998.

The Need for the Proposed Action

On May 6, 1996, the NRC issued NRC Bulletin 96-03, "Potential Plugging of Emergency Core Cooling Suction Strainers by Debris in Boiling Water Reactors," that requested addressees to implement appropriate procedural measures and plant modifications to minimize the potential for clogging of emergency core cooling system (ECCS) suppression pool suction strainers by debris generated during a loss-of-coolant accident (LOCA) and requested that addressees report to the NRC whether they intend to implement the requested actions.

In response to the above cited bulletin, the licensee proposed a plant modification to install replacement

suction strainers in the ECCS pumps. The replacement strainer surface areas, which are substantially larger than the currently installed strainers, are required to reduce potential strainer clogging due to debris in the suppression pool following a postulated loss-of-coolant accident.

Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed action and concludes that the installation of the replacement strainers in the ECCS pumps reduces potential strainer clogging due to debris in the suppression pool following a loss-of-coolant accident and does not change the manner in which the plant is being operated or the environmental impacts of operation. The proposed action involves features entirely within the protected area as defined in 10 CFR part 20.

The proposed action will not increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released offsite, and there is no significant increase in the allowable individual or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does not involve any historic sites and only involves features located entirely within the restricted area as defined in 10 CFR Part 20. It does not affect nonradiological plant effluents and has no other environmental impact. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed action.

Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (i.e., the "no-action" alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement for the Limerick Generating Station, Unit 2.

Agencies and Persons Consulted

In accordance with its stated policy, on October 29, 1998, the staff consulted with the Pennsylvania State official, Mr. David Ney of the Bureau of Radiation Protection, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of no significant impact

Based upon the environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated October 6, 1997, as supplemented by letter dated August 28, 1998, which are available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Pottstown Public Library, 500 High Street, Pottstown, Pennsylvania.

Dated at Rockville, Maryland, this 12th day of May 1999.

For the Nuclear Regulatory Commission.

James W. Clifford,

Chief, Section 2, Project Directorate 1, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 99-12492 Filed 5-17-99; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of May 17, 24, 31, and June 7, 1999.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of May 17

There are no meetings scheduled for the Week of May 17.

Week of May 25—Tentative

Thursday, May 27

11:30 a.m.

Affirmation Session (Public Meeting), (if needed)

Week of May 31—Tentative

There are no meetings scheduled for the Week of May 31.

Week of June 7—Tentative

There are no meetings scheduled for the Week of June 7.

The Schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415-1292. Contact person for more information: Bill Hill (301) 415-1661.

* * * * *

ADDITIONAL INFORMATION: By a vote of 5-0 May 12, the Commission determined pursuant to U.S.C. 552b(e) and §9.107(a) of the Commission's rules that "Discussion of Management Issues" (Closed-Ex. 2 and 6) be held on May 12, and on less than one week's notice to the public.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: <http://www.nrc.gov/SECY/smj/schedule.htm>.

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This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to it, please contact the Office of the Secretary, Attn: Operations Branch, Washington, D.C. 20555 (301-415-1661). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

Dated: May 13, 1999.

William M. Hill, Jr.,

Secy Tracking Officer, Office of the Secretary.
[FR Doc. 99-12594 Filed 5-14-99; 3:10 p.m.]

BILLING CODE 7590-01-M

NUCLEAR REGULATORY COMMISSION**Revision of Operator Licensing Examination Standards for Power Reactors: Availability**

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of Availability.

SUMMARY: The Nuclear Regulatory Commission has issued Revision 8 of NUREG-1021, "Operator Licensing Examination Standards for Power Reactors," (formerly "Operator Licensing Examiner Standards"). The Commission uses this document to provide policy and guidance for the development, administration, and grading of written examinations and operating tests used to determine the qualifications of individuals who apply for operator and senior operator licenses at nuclear power plants pursuant to Part 55 of Title 10 of the Code of Federal

Regulations (10 CFR Part 55). The NUREG provides similar guidance for verifying the continued qualifications of licensed operators when the staff determines that NRC requalification examinations are necessary.

NUREG-1021 has been revised to implement an amendment to 10 CFR Part 55 that allows power reactor facility licensees to prepare their initial operator licensing examinations or to request the NRC to prepare their examinations. The changes in Revision 8 include: (1) lessons learned since beginning the pilot examination program described in Generic Letter 95-06, "Changes in the Operator Licensing Program," dated August 15, 1995; (2) adjustments made in response to public comments submitted in connection with a draft of Revision 8, which was issued for comment on February 22, 1996 (61 FR 6869); and (3) adjustments made in response to public comments submitted in connection with Interim Revision 8, which was issued for use in February 1997 (62 FR 8462), and the proposed amendment to 10 CFR Part 55 that was published on August 8, 1997 (62 FR 42426). The "Executive Summary" section of the NUREG briefly describes all of the significant changes between Revision 7 (Supplement 1) and Revision 8.

Revision 8 will become effective concurrent with the associated amendment to 10 CFR Part 55 or at an earlier date agreed upon by the facility licensee and its NRC Regional Office. Facility licensees that elect to prepare their examinations will do so based on the guidance in NUREG-1021, unless the NRC has reviewed and approved the facility licensee's alternative examination procedures.

Copies of NUREG-1021, Revision 8, are being mailed to the plant or site manager at each nuclear power facility regulated by the NRC. A copy is available for inspection and/or copying for a fee in the NRC's Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC. NUREG-1021 is also electronically available for downloading from the internet at "<http://www.nrc.gov>."

Dated At Rockville, Maryland, this 23rd day of April 1999.

For the Nuclear Regulatory Commission.

Robert M. Gallo,

Chief, Operator Licensing, Human Performance and Plant Support Branch, Division of Inspection Program Management, Office of Nuclear Reactor Regulation.

[FR Doc. 99-12495 Filed 5-17-99; 8:45 am]

BILLING CODE 7590-01-M

RAILROAD RETIREMENT BOARD**Agency Forms Submitted for OMB Review**

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Railroad Retirement Board (RRB) has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s)

(1) *Collection title:* Employee Noncovered Service Pension Questionnaire.

(2) *Form(s) submitted:* G-209.

(3) *OMB Number:* 3220-0154.

(4) *Expiration date of current OMB clearance:* 7/31/1999.

(5) *Type of request:* Extension of a currently approved collection.

(6) *Respondents:* Individuals or households.

(7) *Estimated annual number of respondents:* 500.

(8) *Total annual responses:* 500.

(9) *total annual reporting hours:* 55.

(10) *Collection description:* Under Section 3 of the Railroad Retirement Act, the Tier 1 portion of an employee annuity may be subjected to a reduction for benefits received based on work not covered under the Social Security Act or Railroad Retirement Act. The questionnaire obtains the information needed to determine if the reduction applies and the amount of such reduction.

FOR FURTHER INFORMATION CONTACT:

Copies of the form and supporting documents can be obtained from Chuck Mierzwa, the agency clearance officer (312-751-3363). Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, 60611-2092 and the OMB reviewer, Laurie Schack (202-395-7316), Office of Management and Budget, Room 10230, New Executive Office Building, Washington, DC 20503.

Chuck Mierzwa,

Clearance Officer.

[FR Doc. 99-12497 Filed 5-17-99; 8:45 am]

BILLING CODE 7905-01-M

SECURITIES AND EXCHANGE COMMISSION**Proposed Collection; Comment Request**

Upon Written Request, Copies Available From: Securities and Exchange

Commission, Office of Filings and Information Services, 450 5th Street, NW, Washington, DC 20549-0102.
Extension: Rule 19b-1, SEC File No. 270-312, OMB Control No. 3235-0354

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Rule 19b-1 is entitled "Frequency of Distribution of Capital Gains." The rule prohibits registered investment companies ("funds") from distributing long-term capital gains more than once every twelve months unless certain conditions are met. Rule 19b-1(c) permits unit investment trusts ("UITs") engaged exclusively in the business of investing in certain eligible fixed-income securities to distribute long-term capital gains more than once every twelve months, if (i) the capital gains distribution falls within one of several categories specified in the rule [rule 19b-1(c)(1)] and (ii) the distribution is accompanied by a report to the unitholder that clearly describes the distribution as a capital gains distribution [rule 19b-1(c)(2)] (the "notice requirement"). The purpose of this notice requirement is to ensure that unitholders understand that the source of the distribution is long-term capital gains.

Rule 19b-1(e) permits a fund to apply for permission to distribute long-term capital gains more than once a year if the fund did not forsee the circumstances that created the need for the distribution. The application must set forth the pertinent facts and explain the circumstances that justify the distribution. An application that meets those requirements is deemed to be granted unless the Commission denies the request within 15 days after the Commission receives the application. The Commission uses the information required by rule 19b-1(e) to facilitate the processing of requests from funds for authorization to make a distribution that would not otherwise be permitted by the rule.

The Commission staff estimates the time required to comply with the notice requirement of rule 19b-1(c) to be one hour or less for each additional distribution of long-term capital gains. As of December 31, 1998, there were approximately 11,500 UIT portfolios that may be eligible to use the rule. The

staff estimates that on average each UIT may be required to prepare a notice under the rule one time each year. Therefore, the estimated total annual maximum reporting burden is 11,500 hours.

The Commission staff estimates that the time required to prepare an application under rule 19b-1(e) is approximately four hours. The staff estimates that on average six funds each file one application per year under this rule. Based on these estimates, the total paperwork burden is 24 hours for paragraph (e) of rule 19b-1.

Based on these calculations, the total number of respondents for rule 19b-1 is estimated to be 11,506 (11,500 UIT portfolios + 6 funds filing applications) and the total number of burden hours is estimated to be 11,524 (11,500 hours for the notice requirement + 24 hours for applications). This estimate of burden hours represents a decrease of 2651 hours from the current allocation of 14,175 burden hours. This decrease is attributable to a decrease in the estimated total number of respondents to rule 19b-1.

These estimates of average burden hours are made solely for purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules.

Written comments are requested on: (1) whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, Mail Stop 0-4, 450 5th Street, NW Washington, DC 20549.

Dated: May 10, 1999.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 99-12457 Filed 5-17-99; 8:45 am]
BILLING CODE 8010-10-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-41390; File No. SR-NASD-99-20]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Firm Quotation Requirements

May 12, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on April 20, 1999, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly owned subsidiary, Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is proposing to amend NASD Rule 4613(b), "Firm Quotations," and IM-4613, "Autoquote policy," to require a market maker to disseminate an inferior quote whenever the market maker fails to execute the full size of an incoming order that is at least one normal unit of trading greater than the market maker's published quotation size. The proposal also will prohibit the use of automatic quote updating in such circumstances. Below is the text of the proposed rule change. Proposed new language is in italics.

4613. Character of Quotations

(a) No changes.

(b) Firm Quotations.

(1) A market maker that receives an offer to buy or sell from another member of the Association shall execute a transaction for at least a normal unit of trading at its displayed quotations as disseminated in The Nasdaq Stock Market at the time of receipt of any such offer. If a market maker displays a quotation for a size greater than a normal unit of trading, it shall, upon receipt of an offer to buy or sell from another member of the Association, execute a transaction at least at the size displayed.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(2) If a market maker, upon receipt of an offer to buy or sell from another member of the Association in any amount that is at least one normal unit of trading greater than its published quotation size as disseminated in *The Nasdaq Stock Market at the time of receipt of any such offer, executes a transaction in an amount of shares less than the size of the offer, then such market maker shall, immediately after such execution, display a revised quotation at a price that is inferior to its previous published quotation. The failure of a market maker to execute the offer in an amount greater than its published quotation size shall not constitute a violation of subparagraph (b)(1) of this rule.*

(c)–(e) No changes.

IM–4613. Autoquote Policy

(a) No changes.

(b) Exceptions to the General Prohibition—Automated updating of quotations is permitted when: (1) the update is in response to an execution in the security by that firm (such as execution of an order that partially fills a market maker's quotation size), and is in compliance with Rule 4613(b)(2); (2) it requires a physical entry (such as a manual entry to the market maker's internal system which then automatically forwards the update to Nasdaq); (3) the update is to reflect the receipt, execution, or cancellation of a customer limit order; or (4) an electronic communications network as defined in SEC Rule 11Ac1–1(a)(8) is required to maintain a two-sided quotation in Nasdaq for the purpose of meeting Nasdaq system design requirements.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Nasdaq is proposing to modify NASD Rule 4613(b) to require a market maker, when presented with an order that is at

least one normal unit of trading greater than the market maker's published quotation size, to immediately move its published quotation to an inferior price if the market maker fails to execute the full size of the order presented. Nasdaq seeks this modification to correct an inefficient market situation wherein multiple small orders are required to accomplish the objectives of a single larger order. Such inefficiencies occur whenever a market maker enters a minimum quotation size, receives an order larger than its quoted size, fills the order only up to its quoted size (as currently required under NASD Rule 4613(b)), and remains at the inside quote prepared to accept another order at the minimum quotation size.

The following example illustrates this scenario:

Market maker #1 ("MM1") is bidding ABCD security at \$10 for 100 shares. Order Entry Firm #1 ("OE1") sends a preferred SelectNet order to MM1 to sell 1,000 shares of ABCD at \$10. MM1 partially executes OE1's 1,000 share order by buying³ 100 shares of ABCD, and does not move its quotation. Assuming MM1 is alone at the inside, OE1 may be compelled to resend multiple SelectNet messages to MM1, potentially resulting in a total of ten transactions, to complete its 1,000 share order.

In this example, according to Nasdaq, MM1 has acted in conformity with NASD Rule 3320, "Offers at Stated Prices," IM–3320, "Firmness of Quotations," NASD Rule 4613(b), and SEC Rule 11Ac1–1, as they are currently written, by executing a presented order up to its published quotation price and size. However, it is apparent the MM1 was willing to buy more than the 100 shares displayed. Requiring OE1 to send repeated SelectNet messages (or make multiple telephone calls) to MM1 results in increased transaction costs to MM1, OE1, and, eventually, the public customer. Moreover, this situation impedes the price discovery process which would occur through transactions with other market makers at varying prices and precludes other market makers from positioning and executing large orders.

Nasdaq believes that this scenario creates an inefficient marketplace wherein multiple identical small orders must be executed in place of a single larger order. This quotation and trading

activity ultimately degrades market quality and imposes increased costs and burdens on other market participants seeking to executive customer and proprietary orders. Nasdaq also believes that this situation leads to increased instances of locked and crossed markets and hinders price continuity.

For example, if MM1 is bidding 100 shares at \$20, and MM2 wishes to lower its offer (currently \$20^{1/16}) to \$20, MM2 would send MM1 a SelectNet message for 100 shares (or more) in an attempt to exhaust MM1's quote. MM2, after making multiple attempts to take out MM1 by sending SelectNet messages, may thereafter move its quote to \$20, thereby locking the market. MM1's actions, in Nasdaq's view, create questions of market integrity.⁴

Nasdaq believes that the proposed rule change will effectuate the display by market makers of their true and intended quotation size. When a market maker is presented with an order larger than its displayed size and completes the order only at its displayed size, this presents a clear indication that the market maker's interest in trading at that price level has been depleted. The market maker would then adjust its quotation to an inferior price level, thereby permitting another market maker to assume the priority position.

Nasdaq also proposes to modify IM–4613(b) to mandate compliance with proposed NASD Rule 4613(b)(2). IM–4613(a) generally prohibits the use of "autoquote" mechanisms to automatically generate a new quote that would keep a market maker's quote away from the best market. IM–4613(b)(1) provides an exception to this rule that permits the use of autoquote functions when the update is in response to an execution in the security by that firm. Nasdaq proposes to revise IM–4613(b)(1) to require that the market maker comply with proposed NASD Rule 4613(b)(2) by allowing the market maker to automatically update its quote only after fully executing the incoming order. If the order is not executed in full, the autoquote functionality must be discontinued and the quote moved to an inferior price level.

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6),⁵

³ Although the initial proposal mistakenly used the word "selling" in this example, Nasdaq corrected this error. Telephone conversation among Scott W. Anderson, Attorney, Nasdaq, and Yvonne Fraticelli, Special Counsel, Division of Market Regulation ("Division"), SEC, and Joseph Morra, Attorney, Division, SEC, on April 29, 1999.

⁴ Nasdaq notes that the NASD recently amended NASD Rule 4623, "Electronic Communication Networks," to prohibit ECNs from engaging in similar behavior. See Exchange Act Release No. 40455 (September 22, 1998), 63 FR 51978 (September 29, 1998) (Order approving File No. SR–NASD–98–01).

⁵ 15 U.S.C. 78o–3(b)(6).

15A(b)(11),⁶ and Section 11A of the Act.⁷ Section 15A(b)(6) requires that the rules of a registered national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect that mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. These rules may not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 15A(b)(11) requires that the rules of a registered national securities association be designed to produce fair and informative quotations, prevent fictitious or misleading quotations and to promote orderly procedures for collecting, distributing, and publishing quotations. Section 11A(a)(1)(C) provides that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure: (1) economically efficient execution of securities transactions; (2) fair competition among brokers and dealers; (3) the availability to brokers, dealers and investors of information with respect to quotations and transactions in securities; (4) the practicability of brokers executing investors' orders in the best market; and (5) an opportunity for investors' orders to be executed without the participation of a dealer.

Nasdaq believes that the proposed rule promotes the objectives of Sections 15A(b)(6) and (11) and Section 11A of the Act by producing fair and informative quotations and the economically efficient execution of securities transactions. Nasdaq believes that the proposed rule will encourage market makers to display quotes at their true and intended size, thereby providing increased transparency, fewer transactions and resultant expenses, and a more fair and efficient marketplace, benefiting market participants and public customers.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such data if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-99-20 and should be submitted by June 8, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99-12458 Filed 5-17-99; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new, and/or currently approved information collection.

DATES: Comments should be submitted on or by July 19, 1999.

FOR FURTHER INFORMATION CONTACT: Curtis B. Rich, Management Analyst, Small Business Administration, 409 3rd Street, S.W., Suite 5000, Washington, DC 20416. Phone Number: 202-205-6629.

SUPPLEMENTARY INFORMATION:

Title: "Survey of 8(a) Business Development Program Results and Impact".

Form No: 2109.

Description of Respondents: 8(a) Firms that are current and past program participants.

Annual Responses: 7,463.

Annual Burden: 1,819.

Comments: Send all comments regarding this information collection to Richard Hayes, Associate Deputy Administrator, Office of Government Contacting and Minority Enterprise Development, Small Business Administration, 409 3rd Street SW., Suite 8000, Washington, DC 20416. Phone No: 202-205-6459.

Send comments regarding whether this information collection is necessary for the proper performance of the function of the agency, accuracy of burden estimate, in addition to ways to minimize this estimate, and ways to enhance the quality.

Jacqueline K. White,

Chief, Administrative Information Branch.

[FR Doc. 99-12413 Filed 5-17-99; 8:45 am]

BILLING CODE 8025-01-U

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3181]

State of Kansas

As a result of the President's major disaster declaration on May 4, 1999, I find that Sedgwick County, Kansas constitutes a disaster area due to damages caused by severe storms and tornadoes beginning on May 3, 1999 and continuing. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on July 2, 1999, and for loans

⁶ 15 U.S.C. 78o-3(b)(11).

⁷ 15 U.S.C. 78k-1.

⁸ 17 CFR 200.30-3(a)(12).

for economic injury until the close of business on February 4, 2000 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 3 Office, 4400 Amon Carter Blvd., Suite 102, Fort Worth, TX 76155.

In addition, applications for economic injury loans from small businesses located in the following contiguous counties in the State of Kansas may be filed until the specified date at the above location: Butler, Cowley, Harvey, Kingman, Reno, and Sumner.

The interest rates are:

	Percent
Physical Damage:	
HOMEOWNERS WITH CREDIT AVAILABLE ELSEWHERE	6.875
HOMEOWNERS WITHOUT CREDIT AVAILABLE ELSEWHERE	3.437
BUSINESSES WITH CREDIT AVAILABLE ELSEWHERE ...	8.000
BUSINESSES AND NON-PROFIT ORGANIZATIONS WITHOUT CREDIT AVAILABLE ELSEWHERE	4.000
OTHERS (INCLUDING NON-PROFIT ORGANIZATIONS) WITH CREDIT AVAILABLE ELSEWHERE	7.000
For Economic Injury:	
BUSINESSES AND SMALL AGRICULTURAL CO-OPERATIVES WITHOUT CREDIT AVAILABLE ELSEWHERE	4.000

The numbers assigned to this disaster are 318112 for physical damage and 9C7600 for economic injury. (Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: May 7, 1999.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 99-12415 Filed 5-17-99; 8:45 am]

BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3180]

State of Oklahoma

As a result of the President's major disaster declaration on May 4, 1999, I find that Caddo, Cleveland, Creek, Grady, McClain, Oklahoma, Kingfisher, Lincoln, Logan, Pottawatomie, and Tulsa Counties in the State of Oklahoma constitute a disaster area due to damages caused by tornadoes and severe storms that occurred on May 3-4, 1999. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on July 2, 1999, and for loans for economic injury until the close of business on February 4, 2000 at the address listed below or other locally announced locations:

Small Business Administration, Disaster Area 3 Office, 4400 Amon Carter Blvd., Suite 102, Fort Worth, TX 76155

In addition, applications for economic injury loans from small businesses located in the following contiguous counties in the State of Oklahoma may be filed until the specified date at the above location: Blaine, Canadian, Comanche, Custer, Garfield, Garvin, Kiowa, Major, Noble, Okfuskee, Okmulgee, Osage, Pawnee, Payne, Pontotoc, Rogers, Seminole, Stephens, Wagoner, Washington, and Washita.

The interest rates are:

	Percent
Physical Damage:	
Homeowners with credit available elsewhere	6.875
Homeowners without credit available elsewhere	3.437
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	7.000

	Percent
For Economic Injury:	
Businesses and small agricultural cooperatives without credit available elsewhere	4.000

The numbers assigned to this disaster are 318012 for physical damage and 9C7500 for economic injury.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: May 7, 1999.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 99-12412 Filed 5-17-99; 8:45 am]

BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3182]

State of Texas

As a result of the President's major disaster declaration on May 6, 1999, I find that Bowie County, Texas constitutes a disaster area due to damages caused by severe storms and tornadoes that occurred on May 4, 1999. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on July 4, 1999, and for loans for economic injury until the close of business on February 7, 2000 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 3 Office, 4400 Amon Carter Blvd., Suite 102, Fort Worth, TX 76155.

In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the above location: Cass, Morris, and Red River Counties in Texas; McCurtain County, Oklahoma; and Little River and Miller Counties in Arkansas.

The interest rates are:

	Percent
Physical Damage:	
HOMEOWNERS WITH CREDIT AVAILABLE ELSEWHERE	6.875
HOMEOWNERS WITHOUT CREDIT AVAILABLE ELSEWHERE	3.437
BUSINESSES WITH CREDIT AVAILABLE ELSEWHERE	8.000
BUSINESSES AND NON-PROFIT ORGANIZATIONS WITHOUT CREDIT AVAILABLE ELSEWHERE	4.000
OTHERS (INCLUDING NON-PROFIT ORGANIZATIONS) WITH CREDIT AVAILABLE ELSEWHERE	7.000
For Economic Injury:	
BUSINESSES AND SMALL AGRICULTURAL COOPERATIVES WITHOUT CREDIT AVAILABLE ELSEWHERE	4.000

The number assigned to this disaster for physical damage is 318212. For economic injury the numbers are

9C7700 for Texas, 9C7800 for Oklahoma, and 9C7900 for Arkansas.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: May 10, 1999.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 99-12414 Filed 5-17-99; 8:45 am]

BILLING CODE 8025-01-P

TENNESSEE VALLEY AUTHORITY

Kingston Fossil Plant (KIF) Alternative Coal Receiving Systems, Roane County, TN

AGENCY: Tennessee Valley Authority

ACTION: Issuance of Revised Record of Decision.

SUMMARY: This notice is provided in accordance with the Council on Environmental Quality's regulations (40 CFR part 1500 to 1508) and TVA's procedures implementing the National Environmental Policy Act. TVA has decided to adopt the preferred alternative (Alternative D) identified in its Final Supplemental Environmental Impact Statement (SEIS) on Kingston Fossil Plant (KIF) Alternative Coal Receiving Systems. A Notice of Availability of the Final SEIS was published in the **Federal Register** on April 2, 1999. Under Alternative D, TVA would receive coal deliveries via the existing rail line with minor upgrades. In addition, TVA would construct a new high-speed coal unloading/loading system in its existing coal yard at KIF. The previously planned new rail spur between Harriman and the existing coal delivery yard would not be constructed. This decision to adopt Alternative D supersedes the previous decision to build the new rail spur signed on March 10, 1997 and published in the **Federal Register** on April 3, 1997 (62 FR 15957-15960).

FOR FURTHER INFORMATION CONTACT:

Harold M. Draper, NEPA Specialist, Environmental Management, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 8C, Knoxville, Tennessee 37902-1499; telephone (423) 632-6889 or e-mail hmdraper@tva.gov.

SUPPLEMENTARY INFORMATION:

The KIF receives by rail about 4 million tons of medium sulfur coal per year. This coal is transported by Norfolk Southern (NS) and CSX Railroads to Harriman, Tennessee. At Harriman (CSX origin), the coal is transported over a short NS spur for transport to NS's Emory Gap rail yard and then to TVA's Caney Creek yard. TVA then moves the coal by rail from Caney Creek yard to KIF, a distance of about 4 miles. While NS has direct access to Caney Creek, CSX trains are charged a switching fee, now approximating \$2 million annually

for use of the NS spur. This switching fee contributes to higher fuel costs at KIF when compared to the fuel costs at other TVA fossil plants. In order to enhance the competitiveness of the KIF plant and to provide more economical access to lower sulfur coals necessary to meet new air quality regulations, TVA investigated alternative methods of coal delivery to the plant in an EIS.

TVA provided public notice of its intent to prepare an Environmental Impact Statement on alternatives for coal delivery to KIF on May 22, 1995. A public meeting on the proposal was held on June 29, 1995. TVA released a draft EIS on May 15, 1996, and held a public meeting to receive comments on the document on June 11, 1996 in Kingston, Tennessee. All comments received were given due consideration in preparing the Final EIS. Notice of Availability of the Final EIS was published in the **Federal Register** on January 31, 1997.

Subsequent to the signing of a Record of Decision and prior to the beginning of construction, TVA received a proposal from one of the railroads affected by the decision for a new delivery system configuration that would avoid construction of a new rail spur. TVA decided to more fully evaluate this new, not previously available alternative in an SEIS. Notice of Availability of the Draft SEIS was published in the **Federal Register** on December 18, 1998. A public meeting was held on January 21, 1999 in Kingston, Tennessee. Six comment letters were received during the public comment period. The comments were given due consideration in preparing the Final SEIS. A Notice of Availability of the Final SEIS was published in the **Federal Register** on April 2, 1999.

Alternatives Considered

In order to reduce the fuel costs for KIF, direct rail delivery was evaluated because it would eliminate rail line switching fees, reduce operation and maintenance costs, and increase competition between the rail carriers. Alternatives initially considered included construction of an overland conveyor, a new barge unloading facility, and a coal slurry pipeline. Also, increased truck deliveries were considered. However, all of these were rejected because they were not feasible from an economic or engineering standpoint. A longer 13-mile rail line from Oliver Springs was also rejected on economic and other grounds. Three alternatives were initially formulated that represented economically feasible options. These were no action and two alternatives that involved construction

of a new rail spur. In the SEIS, a fourth alternative, which would upgrade the existing rail line and install a new high-speed unloading and loading facility with stacking tubes to facilitate blending of coals, was evaluated.

Under *Alternative A*, No Action, conditions and impacts resulting from the existing coal delivery system would not change. However, this route, which passes through downtown Harriman, blocks five street crossings and impacts the ability of the city and county governments to provide emergency services during portions of the day. There are also ongoing noise impacts resulting from 30-car rail trips to the plant about six times per day.

Under *Alternative B*, Rail Spur Route #1, new rail spurs would originate at the CSX Harriman Yard or near the NS line at Walnut Hill. From north to south, the route would cross Bullard Branch and Quarry Branch (CSX spur only), pass south of the Fiske Road community, pass through the Harriman Industrial Park, cross the Emory River, and extend overland about three miles to the plant. Proceeding south from the Emory River, the route would cross Swan Pond Circle Road, cross an unnamed stream, pass under existing transmission lines, cross Swan Pond embayment on a causeway, cross Swan Pond Circle Road, cross Swan Pond Road, cross Swan Pond Creek, and link up with the existing rail line.

Implementation of Alternative B would result in the construction of a rail spur approximately 4.5 miles in length. From an infrastructure standpoint, trains would bypass downtown Harriman; however, in order to avoid two road crossings in a short distance, Swan Pond Road and Swan Pond Circle would need to be relocated near their junction, creating one crossing. Bridges would need to be constructed across the Emory River and two small creeks; and there would be a new causeway across Swan Pond embayment. Other traffic impacts would be that one existing and two new crossings would be blocked to allow trains to pass; however, because the roads are used less than the ones crossed by the current route, fewer vehicles would be impacted. Under this alternative, there would be 24,730 fewer vehicle crossings of the rail route per day than under the No Action alternative.

Trains following the new rail line would increase noise levels in the Fiske Road community of Harriman. However, the largest potential noise increase in this community over existing levels is 0.4 decibels (dBA). The quieter Swan Pond Circle Road community south of the Emory River would also be impacted

by operation of a new rail line. Noises in this community would result from crossing bridges, road crossing bells, train whistles, and wheel squeal due to track curvature. In this area, the largest potential noise increase would be 2.0 dBA over existing levels. In order to reduce this impact, welded rail would be used rather than jointed rail in the Swan Pond Circle area. Construction of the rail spur in Alternative B would result in the loss of 7 acres of prime farmland and a 5-acre beaver-created wetland. However, to the extent practicable, TVA would locate the rail spur above the 750-foot contour in the Swan Pond embayment area to avoid wetland involvement. With strict adherence to Best Management Practices during construction of the proposed rail spur, no significant impacts to water quality, floodplains, wildlife, recreation, or endangered species are expected. However, because the rail construction would take place in a karst geology area, there is some risk of sinkhole subsidence. This would be minimized by proper geotechnical investigations. Approximately 43 views from residences would be affected. There would be a 31 percent reduction in locomotive emissions as compared to the No Action alternative. An archaeological survey of the proposed route identified four sites that were eligible or potentially eligible for listing in the National Register of Historic Places that could be impacted by the proposed route. These impacts would be mitigated by conducting data recovery excavations. Although most of the area is sparsely populated, it appears that compared to the no action alternative, fewer minority population groups would be affected; however, slightly more low income individuals would be affected.

Under *Alternative C*, Rail Spur Route #2, the route would not cross Swan Pond embayment after crossing under transmission lines, but would proceed south along the east side of Swan Pond, cross Swan Pond Circle Road, cross the narrow embayment fronting the KIF ash stack on a causeway, and run parallel with Swan Pond Road and the existing rail line to the plant rail yard. Implementation of *Alternative C* would result in construction of a rail spur 4.75 miles in length. Under this alternative, there would be 28,600 fewer vehicle crossings of the rail route per day than under the No Action alternative. Construction along the *Alternative C* route would not result in loss of prime farmland and would only involve minor wetland crossings. Approximately 37 residential views would be affected.

There would be slightly higher impacts on low-income individuals than *Alternative B*. Other impacts would be similar to those of *Alternative B*.

Under *Alternative D*, New Coal Unloader and Blender Facility, the origin part of the coal burned at KIF would be different, resulting in impacts from the transportation of this coal along a different route. While eastern coal from Tennessee and Kentucky would continue to be transported to Kingston, a blend of eastern and western Powder River Basin coals would be burned. Trains arriving from the West or from the East would utilize rapid discharge hopper cars. The hopper cars would arrive as part of "unit trains" consisting of 90 to 120 cars. These would be longer trains than the ones currently used under the No Action *Alternative*. If coal were blended only for Kingston, implementation of *Alternative D* would mean fewer passes per day. However, TVA anticipates that coal would also be blended for two other facilities, John Sevier Fossil and Bull Run Fossil plants. The number of train passes per day at a given intersection would not change if blending for other plants also takes place at KIF. A loaded train would begin unloading operations while slowly moving at less than one mile per hour. This alternative would involve occasional nighttime deliveries which may increase noise heard by nearby residents. In addition, emissions from locomotives would be increased due to the longer coal transport distances. However, plant emissions would be greatly reduced due to the burning of western coal. In addition, existing crossings at U.S. 27 and Carlock Avenue in Harriman would be removed, decreasing delays for traffic and emergency vehicles in the area. No additional property would be needed, and there would be no new floodplain, wetland, cultural resource, or environmental justice impacts, in comparison with No Action.

TVA Decision

The Final SEIS identified *Alternative D* as the preferred alternative. *Alternative D* avoids the construction of a rail line at a new location, and as a result avoids wetland, cultural, navigation, water quality, and prime farmland impacts. It also eliminates two heavily used railroad-highway intersections, and reduces sulfur dioxide and nitrogen oxide emissions from plant boilers. With the implementation of *Alternative D*, TVA would be able to reduce fuel costs and produce electricity at the lowest possible rate.

After carefully considering all comments, TVA has decided to implement *Alternative D*.

Environmentally Preferable Alternative

Because *Alternative A*, No Action, would result in no change in existing conditions, it could be characterized as the environmentally preferable alternative. However, *Alternative A* does not accomplish the goal of reducing fuel costs. Of the action alternatives, *Alternative D* is substantially better from an environmental standpoint than the two rail spur alternatives because it does not involve construction along a new rail corridor and does not have effects on wetlands, floodplains, water quality, and prime farmlands.

Environmental Consequences and Commitments

In evaluating *Alternative D*, TVA found that occasional nighttime deliveries may increase noise levels. In addition, construction noise may also be noticeable at night. While sulfur dioxide, nitrogen oxides, and lead emissions would decrease in comparison with the other alternatives, other emissions would slightly increase due to the longer coal transport distances. In commenting on the Final SEIS, the Environmental Protection Agency recommended that noise levels be monitored at nearby residences and requested commitments to noise mitigation. TVA has decided to commit to construction noise mitigation measures, including inspection of equipment for muffler effectiveness, limitation of high noise operations to daylight hours, minimization of second and third shift construction activities, and notification of nearby residents during any blasting operations. The noise impacts from unit train unloading and locomotive movement at night would be infrequent and have an incremental impact of only 2 to 3 decibels (dBA) above current levels in the area. Therefore, TVA does not believe that monitoring of noise levels or implementation of physical noise barriers would be needed. However, TVA will reconsider train noise mitigation measures if night deliveries become a frequent occurrence.

Dated: May 7, 1999.

Kathryn J. Jackson,

Executive Vice President, River System Operations & Environment.

[FR Doc. 99-12420 Filed 5-17-99; 8:45 am]

BILLING CODE 8120-08-P

**OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE**

[Docket No. WTO/D-163]

**WTO Dispute Settlement Proceeding
Regarding Korea—Measures Affecting
Government Procurement**

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative ("USTR") is providing notice of the request for the establishment of a dispute settlement panel under the Marrakesh Agreement Establishing the World Trade Organization ("WTO"), by the United States, to examine the Republic of Korea's government procurement practices in the construction of the Incheon International Airport. In this dispute, the United States alleges that these practices are inconsistent with Korea's obligations under the Government Procurement Agreement ("GPA"). USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted by June 15, 1999, to be assured of timely consideration by USTR in preparing its first written submission to the panel.

ADDRESSES: Comments may be submitted to Sandy McKinzy, Litigation Assistant, Office of Monitoring and Enforcement, Room 122, Attn: Korea Airport Procurement Dispute, Office of the United States Trade Representative, 600 17th Street, NW, Washington, DC 20508.

FOR FURTHER INFORMATION CONTACT: John G. Ellis, Director for Government Procurement Issues, (202) 395-3063; Mary Latimer, Director for Korean Affairs, (202) 395-6813; or Stephen Kho, Assistant General Counsel, (202) 395-3581.

SUPPLEMENTARY INFORMATION: Pursuant to section 127(b) of the Uruguay Round Agreements Act ("URAA") (19 U.S.C. 3537(b)(1)), USTR is providing notice that on May 11, 1999, the United States submitted a request for the establishment of a WTO dispute settlement panel to examine whether certain government procurement measures, employed by Korea in the construction of the Incheon International Airport, are inconsistent with Korea's obligations under the GPA. The WTO Dispute Settlement Body ("DSB") will consider the United States' first request

for the establishment of a panel on May 26, 1999.

Major Issues Raised and Legal Basis of the Complaint

The United States asserts that the following Korean government procurement practices are inconsistent with the GPA: (1) Requirements that suppliers have manufacturing facilities in Korea before participating in tender procedures; (2) requirements that foreign firms partner with or act as subcontractors to Korean firms in order to participate in tendering procedures; (3) absence of access to bid challenge procedures for Incheon International Airport and other airport procurements; and (4) impositions of deadlines for the receipt of tenders that are shorter than the GPA-required 40 days.

As its defense, Korea is claiming that the entities responsible for Incheon International Airport procurements are not within its GPA obligations, and therefore not subject to the requirements of the GPA. However, these entities are within the scope of Korea's GPA obligations, pursuant to Article I(1) of the GPA. The United States bargained in good faith for the coverage of all airport construction in Korea during negotiations for Korea's accession to the GPA. Consequently, the United States believes that the above measures are inconsistent with Articles III, VIII, XI, XVI, and XX of the GPA. In addition, whether or not these measures conflict with the provisions of the GPA, they nullify or impair benefits accruing to the United States under the GPA.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Comments must be in English and provided in fifteen copies to Sandy McKinzy at the address provided above. A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitting person. Confidential business information must be clearly marked "BUSINESS CONFIDENTIAL" in a contrasting color ink at the top of each page of each copy.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by the USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitting

person believes that information or advice may qualify as such, the submitting person—

(1) Must so designate the information or advice;

(2) Must clearly mark the material as "SUBMITTED IN CONFIDENCE" in a contrasting color ink at the top of each page of each copy; and

(3) Is encouraged to provide a non-confidential summary of the information or advice.

Pursuant to section 127(e) of the URAA (19 U.S.C. 3537(e)), the USTR will maintain a file on this dispute settlement proceeding, accessible to the public, in the USTR Reading Room: Room 101, Office of the United States Trade Representative, 600 17th Street, NW, Washington, DC 20508. The public file will include a listing of any comments received by the USTR from the public with respect to the proceeding; the U.S. submissions to the panel in the proceeding, the submissions, or non-confidential summaries of submissions, to the panel received from other parties in the dispute, as well as the report of the dispute settlement panel, and, if applicable, the report of the Appellate Body. An appointment to review the public file (Docket WTO/D-163, Korea Airport Procurement Dispute) may be made by calling Brenda Webb, (202) 395-6186. The USTR Reading Room is open to the public from 9:30 a.m. to 12 noon and 1 p.m. to 4 p.m., Monday through Friday.

A. Jane Bradley,

Assistant U.S. Trade Representative for Monitoring and Enforcement.

[FR Doc. 99-12433 Filed 5-17-99; 8:45 am]

BILLING CODE 3190-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for extension of currently approved collections. The ICR describes the nature of the information collection and its expected burden. The Federal Register Notice with a 60-day comment

period soliciting comments on the following collection of information was published on March 12, 1999, [FR 64, page 12399].

DATES: Comments must be submitted on or before June 17, 1999. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Judy Street on (202) 267-9895.

SUPPLEMENTARY INFORMATION:

Federal Aviation Administration (FAA)

Title: Federal Aviation Administration Acquisition Management System (FAAAMS).

Type of Request: Extension of a currently approved collection.

OMB Control Number: 2120-0595.

Forms(s): FAA Acquisition Management System Format.

Affected Public: Contractors, offerors wishing to do business with the FAA.

Abstract: Pursuant to section 348 of Public Law 104-50, the FAA implemented an acquisition management system that addresses the unique needs of the agency. The information obtained is necessary in order that the FAA's acquisition organization may be able to plan and conduct acquisitions of varying types (supplies, services, real estate, etc.) including establishing contracts and monitoring contractor compliance.

Estimated Annual Burden Hours: 110,456 burden hours annually.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725-17th Street, NW., Washington, DC 20503, Attention FAA Desk Officer.

Comments Are Invited On

Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on May 12, 1999.

Steve Hopkins,

Manager, Standards and Information Division, APF-100.

[FR Doc. 99-12516 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Program Management Committee Working Group Weather Message Switching Center Replacement (WMSCR)

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C., Appendix 2), notice is hereby given for the RTCA Program Management Committee (PMC) meeting to be held June 17, 1999, starting at 9:00 a.m. The meeting will be held at RTCA, Inc., 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036.

The agenda will include: (1) Co-Chairmen's Opening Remarks; (2) FAA Presentations: (a) Current Weather Message Switching Center Replacement (WMSCR) Architecture; (b) WMSCR Sustainment Plan; (3) Mission Need Validation; (4) Review/Discuss Industry Comment: (a) Near-Term Sustainment (1999-2003); (b) Mid-Term Functional Enhancements (2003-2009); (5) Prepare consensus recommendations(s) to forward to the FAA; (6) Closing.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, 1140 Connecticut Avenue, NW., Suite 1020, Washington, DC 20036; (202) 833-9339 (phone); (202) 833-9434 (fax); or <http://www.rtca.org> (web site). Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on May 13, 1999.

Janice L. Peters,

Designated Official.

[FR Doc. 99-12513 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Special Committee 159; Minimum Operational Performance Standards for Airborne Navigation Equipment Using Global Positioning System (GPS)

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 159 meeting to be held June 7-11, 1999, starting at 9:00 a.m. The meeting will be held at RTCA, 1140 Connecticut Avenue, NW., Washington, DC 20036.

The agenda will be as follows:

Specific Working Group Sessions:
June 7: Working Group 1, Third Civil Frequency; Working Group 2C, Global Positioning System (GPS)/Inertial; 1:30-4:30 p.m., Working Group 6, Interference. June 8: Working Group 4, Precision Landing Guidance (LAAS CAT I/II/III); 1:30-4:30 p.m., Ad Hoc, Recommendation Support. June 9: Working Group 2, WAAS; Working Group 4, Precision Landing Guidance (LAAS CAT I/II/III). June 10: 9:00 a.m.-12:00 p.m., Working Group 4, Precision Landing Guidance (LAAS CAT I/II/III); 9:00 a.m.-12:00 p.m., Working Group 5, Airport Surface Surveillance.

June 10, 1:30-4:30 p.m., Plenary Session (continuing on June 11): (1) Chairman's Introductory Remarks; (2) Review/Approval of Minutes of Previous Meeting; (3) Review WG Progress and Identify Issues for Resolution: (a) GPS/Third Civil Frequency (WG-1); (b) GPS/WAAS (WG-2); (c) GPS/GLONASS (WG-2A); (d) GPS/Inertial (WG-2C); (e) GPS/Precision Landing Guidance (WG-4); (f) GPS/Airport Surface Surveillance (WG-5); (g) GPS/Interference (WG-6); (h) SC-159 Ad Hoc; (4) Review of EUROCAE Activities; (5) Review/Approval of Minimum Operational Performance Standards for Global Positioning System/Wide Area Augmentation System Airborne Equipment (DO-229B) and Minimum Operational Performance Standards for Global Navigation Satellite Systems (GNSS) Airborne Antenna Equipment (Change 1 to DO-228); (6) Assignment/Review of Future Work; (7) Other Business; (8) Date and Location of Next Meeting.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact Mr. Harold Moses, RTCA Program Director, at (202) 833-9339 (phone), (202) 833-9434 (fax), or hmoses@rtca.org (electronic mail). Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on May 12, 1999.

Janice L. Peters,

Designated Official.

[FR Doc. 99-12514 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****Notice of Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Birmingham International Airport, Birmingham, Alabama**

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Birmingham International Airport under the provisions of the aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) Pub. L. 101-508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before June 17, 1999.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: 120 North Hangar Drive, Suite B Jackson, MS39208-2306.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to the Mr. Loyce Clark, Director of Planning and Development, of the Birmingham Airport Authority at the following address: Birmingham Airport Authority, 5900 Airport Highway, Birmingham, AL 35212.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Birmingham Airport Authority under § 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Keafur Grimes, Program Manager, Jackson Airports District Office, 120 North Hangar Drive, Suite B, Jackson, MS 39208-2306, Phone 601-965-4628. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Birmingham International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On May 6, 1999, the FAA determined that the application to impose and use the revenue from a PFC submitted by Birmingham Airport Authority was

substantially complete within the requirements of section 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than August 24, 1999.

The following is a brief overview of the application.

PFC Application No.: 99-02-C-00-BHM.

Level of the proposed PFC: \$3.00.

Proposed charge effective date:

August 1, 1999.

Proposed charge expiration date:

September 30, 2000.

Total estimated PFC revenue:

\$10,736,857.

Brief description of proposed project(s): Rehabilitate Runway 5/23, Taxiway/Hold Apron Improvements, Install Hydrant System, and Rehabilitate Airport Drainage Culvert.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air Taxi Commercial Operators filing FAA Form 1800-31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Birmingham Airport Authority.

Issued in Jackson, Mississippi on May 11, 1999.

Wayne Atkinson,

Manager, Jackson Airports District Office, Southern Region.

[FR Doc. 99-12512 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****Notice of Intent to Rule on Application to Impose and Use the Revenue from a Passenger Facility Charge (PFC) at Lubbock International Airport, Lubbock, Texas**

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Lubbock International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before June 17, 1999.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate copies to the FAA at the following address: Mr. Ben Guttery, Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW-610D, Fort Worth, Texas 76193-0610.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Mark N. Earle, Director of Aviation, at the following address: Mr. Mark N. Earle, Director of Aviation, Lubbock International Airport, 5401 North Martin Luther King Blvd., Lubbock, Texas 79401-9710.

Air carriers and foreign air carriers may submit copies of the written comments previously provided to the Airport under § 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Ben Guttery, Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW-610D, Fort Worth, Texas 76193-0610, (817) 222-5614.

The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Lubbock International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On May 6, 1999, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Airport was substantially complete within the requirements of Section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than September 3, 1999.

The following is a brief overview of the application.

Level of the proposed PFC: \$3.00.

Proposed charge effective date: April 1, 2000.

Proposed charge expiration date: August 1, 2002.

Total estimated PFC revenue:

\$4,527,023.00

PFC application number: 99-04-C-00-LBB.

Brief description of proposed projects:

Projects To Impose and Use PFCs

Signs and Graphics Improvements, PFC Application, Entrance Road and

Canopy Improvements, Westport Access Road, ADA/Maintenance Elevator, Reconstruct/Repair Runway 17R-35L, Westport Apron and Taxiway Expansion, Taxiway B-1, and ADA Aircraft Access.

Proposed class or classes of air carriers to be exempted from collecting PFC's: FAR Part 135 air charter operators who operate aircraft with a seating capacity of less than 10 passengers.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA regional Airports office located at: Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW-610D, 2601 Meacham Blvd., Fort Worth, Texas 76137-4298.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at Lubbock International Airport.

Issued in Fort Worth, Texas on May 7, 1999.

Naomi L. Saunders,
Manager, Airports Division.

[FR Doc. 99-12515 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA DOCKET NO. FHWA-99-5473]

Qualification of Drivers; Exemption Application; Vision

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of petition and intent to grant application for exemption; request for comments.

SUMMARY: This notice announces the FHWA's preliminary determination to grant the application of James F. Durham for an exemption from the vision requirements in the Federal Motor Carrier Safety Regulations (FMCSR). Granting the exemption will enable Mr. Durham to qualify as a driver of commercial motor vehicles (CMVs) in interstate commerce without meeting the vision standard prescribed in 49 CFR 391.41(b)(10).

DATES: Comments must be received on or before June 17, 1999.

ADDRESSES: Your written, signed comments must refer to the docket number at the top of this document, and you must submit the comments to the Docket Clerk, U.S. DOT Dockets, Room

PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. All comments will be available for examination at the above address between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

FOR FURTHER INFORMATION CONTACT: For information about the vision exemption in this notice, Ms. Sandra Zywokarte, Office of Motor Carrier Research and Standards, (202) 366-2987; for information about the legal issues related to this notice, Ms. Judith Rutledge, Office of the Chief Counsel, (202) 366-0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users can access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the **Federal Register's** home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's database at: <http://www.access.gpo.gov/nara>.

Background

On July 18, 1997, Mr. Durham applied for a waiver of the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. The FHWA denied his application on September 11, 1998, because Mr. Durham did not have three years of recent experience driving with his vision deficiency. He appealed the agency's decision to the United States Court of Appeals for the Sixth Circuit on November 6, 1998. (Case No. 98-4331, *James F. Durham, Jerry W. Parker v. United States Department of Transportation, Federal Highway Administration, and the United States of America*). The FHWA and Mr. Durham have agreed to settle the case without further litigation. In accordance with that agreement, the FHWA has

reconsidered Mr. Durham's waiver application and determined that it should be granted for the reasons discussed in this notice.

When Mr. Durham's application was filed on July 18, 1997, the FHWA was authorized by 49 U.S.C. 31136(e) to waive application of the vision standard if the agency determined the waiver was consistent with the public interest and the safe operation of CMVs. Because the statute did not limit the effective period of a waiver, the agency had discretion to issue waivers for any period warranted by the circumstances of a request. On June 9, 1998, the FHWA's waiver authority changed with enactment of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107 (1998). Section 4007 of TEA-21 amended the waiver provisions of 49 U.S.C. 31315 and 31136(e) to change the standard for evaluating waiver requests, to distinguish between a waiver and an exemption, and to establish term limits for both. Under revised sections 31315 and 31136(e), the FHWA may grant a waiver for a period of up to 3 months or an exemption for a renewable 2-year period. Mr. Durham's application falls within the scope of an exemption request under the revised statute.

The amendments to 49 U.S.C. 31315 and 31136(e) also changed the criteria for exempting a person from application of a regulation. Previously, an exemption was appropriate if it was consistent with the public interest and the safe operation of CMVs. Now the FHWA may grant an exemption if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." According to the legislative history, Congress changed the statutory standard to give the agency greater discretion to consider exemptions. The previous standard was judicially construed as requiring an advance determination that absolutely no reduction in safety would result from an exemption. Congress revised the standard to require that an "equivalent" level of safety be achieved by the exemption, which would allow for more equitable resolution of such matters, while ensuring safety standards are maintained. (See H.R. Conf. Rep. No. 105-550, at 489 (1998)).

Although Mr. Durham's application was filed before enactment of TEA-21, the FHWA is required to apply the law in effect at the time of its decision unless (1) its application will result in a manifest injustice or (2) the statute or legislative history directs otherwise. *Bradley v. School Board of the City of*

Richmond, 416 U.S. 696 (1974). Insofar as the new standard is concerned, nothing in the statute, its history, or the facts in this proceeding meets either of these two tests. In fact, the new standard is more equitable as it allows an exemption to be based on a reasonable expectation of equivalent safety, rather than requiring an absolute determination that safety will not be diminished. In addition, the "public interest" finding required under the previous standard is not necessary under the new exemption standard. These changes enhance the FHWA's discretion to consider exemptions, thus benefitting Mr. Durham rather than causing an injustice.

Although applying TEA-21's new exemption standard does not adversely affect Mr. Durham, subjecting his application to the new procedural requirements would unfairly affect him. Section 4007 requires the Secretary of Transportation to promulgate regulations specifying the procedures by which a person may request an exemption. The statute lists four items of information an applicant must submit with an exemption petition and gives the Secretary 180 days to implement the new procedural regulations. In accordance with that requirement, the FHWA published interim final rules in Docket No. FHWA-98-4145, *Federal Motor Carrier Safety Regulations; Waivers, Exemptions, and Pilot Programs; Rules and Procedures*, 63 FR 67600, December 8, 1998, establishing procedures for requesting an exemption under Section 4007. As the new procedures differ from those in effect when Mr. Durham filed his exemption request, it would be manifestly unjust to further delay resolution of Mr. Durham's application by requiring him to submit information that conforms to the new procedures. To avoid this delay and injustice, we will not apply the new procedural requirements of section 4007 to Mr. Durham's exemption petition.

Accordingly, the FHWA has evaluated Mr. Durham's exemption request on its merits, as required by the decision in *Rauenhorst v. United States Department of Transportation, Federal Highway Administration*, 95 F.3d 715 (8th Cir. 1996), applying the new exemption standard in 49 U.S.C. 31315 and 31136(e). Based on our evaluation, we have determined that exempting him from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption.

Qualifications of Mr. Durham

Mr. Durham is 49 years old and has driven CMVs in various capacities since 1971. From 1974 to 1989, he worked for Yellow Freight System, Inc., in its maintenance department, driving and maintaining company equipment. He became a full-time driver for the carrier in July 1989 and drove approximately 520 miles per week in the Middle Tennessee area until April 1996. At that time, the carrier disqualified him from driving because his vision did not meet the standard in 49 CFR 391.41(b)(10) and he lacked a waiver of the vision requirement.

Mr. Durham's vision deficiency was caused by a penetrating trauma to the right eye in 1992. Corneal scarring, aphakia, and retinal scarring resulted from the injury and has reduced vision in his right eye to finger counting. The uncorrected vision in his left eye measures 20/15, well within regulation standards. According to his doctor, Mr. Durham has variable eye pressure changes in his right eye, but otherwise vision is stable in both eyes. The doctor attests that Mr. Durham is capable of performing tasks related to driving a CMV notwithstanding the limited vision in his right eye.

Following his injury in 1992, Mr. Durham continued to drive for Yellow Freight and was presented a "Safe Driver Award" in 1994 recognizing 13 years of safe driving with the company. After four years of driving with his limited vision, he was disqualified as a driver by the carrier in April 1996 for failing to meet the Federal vision standard. He applied for a waiver in July 1997 and drove part-time for TravelCenters of America from October 1997 until July 1998. At that time, Mr. Durham stopped driving and returned to Yellow Freight where he presently works on the loading docks.

Mr. Durham's driving record since 1994 contains no traffic violations. He was involved in a CMV accident in 1995 that caused property damage but no bodily injury. The accident was judged non-preventable.

Analysis of Mr. Durham's Qualifications

The *Rauenhorst* decision requires the FHWA to evaluate Mr. Durham's application under criteria applied in the vision waiver program. Among other things, that criteria required drivers to have at least 3 years of experience driving a CMV with their vision deficiency and a safe driving record, as reflected by State records, for the 3 years preceding the waiver application. In fact, one basis for adopting the 3-year

requirement was that it corresponds to the period of time for which driver records are maintained by the States. (59 FR 50887, October 6, 1994.)

Mr. Durham drove a CMV with his vision deficiency from 1992 until April 1996, approximately 4 years. He did not drive for 18-months between April 1996 and October 1997, but resumed driving part-time from October 1997 until July 1998. Thus, Mr. Durham has approximately 5 years of experience driving with his vision deficiency overall (1992-April 1996; October 1997-July 1998).

The FHWA previously denied Mr. Durham an exemption due to the 15-month gap in his driving experience during the 3 years immediately preceding his application (April 1996-July 1997). In our decision, we concluded that Mr. Durham's driving experience was too remote to reflect his current ability to drive safely, as driving records are not readily available beyond 3 years. Further, physical conditions change over time, and current driving ability with the vision deficiency may not be reflected in driving experience from 4 or 5 years ago. Thus, we declined to accept Mr. Durham's remote experience as a basis for projecting future ability to drive safely.

We have reconsidered our analysis of Mr. Durham's application and experience, however, and concluded that unique circumstances related to his case enable us to accept his past driving experience as evidence of his ability to drive safely in the future. First, we do have a copy of Mr. Durham's driving record from 1994 through January 28, 1999, reflecting a safe driving record over a 5 year period rather than a 3 year period. As the record reflects no traffic violations and only one accident in a CMV (judged non-preventable) during that 5 year period, it supports the conclusion that Mr. Durham is able to drive safely with his vision deficiency.

Next, Mr. Durham's driving record shows that the gap in his driving experience did not affect his ability to drive safely. Following his 18-month driving break between April 1996 and October 1997, Mr. Durham drove for 10 months without having an accident or committing a traffic violation. That record demonstrates he still has the ability to adapt his driving skills to accommodate his limited vision, just as he had before the break in experience.

Finally, medical statements from 1997 and 1998 indicate Mr. Durham's vision is stable. As he has driven without an accident or traffic violation since October 1997, we think he has demonstrated that his physical ability to

drive safely now is equivalent to his ability 4 to 5 years ago.

Based upon these factors, the FHWA has determined that Mr. Durham has more than three years of creditable safe-driving experience with his vision deficiency to satisfy the *Rauenhorst* criteria and qualify for a vision exemption.

Basis for Preliminary Determination to Grant Exemption

Independent studies support the principle that past driving performance is a reliable indicator of an individual's future safety record. The studies are filed in FHWA Docket No. FHWA-97-2625 and discussed at 63 FR 1524, 1525 (January 9, 1998). We believe we can properly apply the principle to monocular drivers because data from the vision waiver program clearly demonstrates the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively. (See 61 FR 13338, March 26, 1996.) That monocular drivers in the waiver program demonstrated their ability to drive safely supports a conclusion that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely.

Mr. Durham has qualifications similar to those possessed by drivers in the waiver program. His experience and safe driving record operating CMVs demonstrate that he has adapted his driving skills to accommodate his vision deficiency. For that reason, the FHWA believes exempting him from 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption as long as vision in his better eye continues to meet the standard specified in 49 CFR 391.41(b)(10). As a condition of the exemption, therefore, the FHWA proposes to impose requirements on Mr. Durham similar to the grandfathering provisions in 49 CFR 391.64(b) applied to drivers who participated in the agency's former vision waiver program.

These requirements are (1) that he be physically examined every year (a) by an ophthalmologist or optometrist who attests that vision in his better eye meets the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests he is otherwise physically qualified under 49 CFR 391.41; (2) that he provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that he provide a copy of the annual medical certification to his

employer for retention in its driver qualification file or keep a copy in his driver qualification file if he becomes self-employed. He must also have a copy of the certification when driving to present to a duly authorized Federal, State, or local enforcement official.

In accordance with revised 49 U.S.C. 31315 and 31136(e), the proposed exemption will be valid for 2 years unless revoked earlier by the FHWA. The exemption will be revoked if: (1) Mr. Durham fails to comply with the terms and conditions of the exemption; (2) the exemption results in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e). If the exemption is effective at the end of the 2-year period, Mr. Durham may apply to the FHWA for a renewal under procedures in effect at that time.

Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), the FHWA is requesting public comment from all interested parties on the exemption petition and the matters discussed in this notice. All comments received before the close of business on the closing date indicated above will be considered and will be available for examination in the docket room at the above address. Comments received after the closing date will be filed in the docket and will be considered to the extent practicable, but the FHWA may issue an exemption to Mr. Durham and publish in the **Federal Register** a notice of final determination at any time after the close of the comment period. In addition to late comments, the FHWA will also continue to file in the docket relevant information which becomes available after the closing date. Interested persons should continue to examine the docket for new material.

A copy of this notice will be mailed to compliance and enforcement personnel in the State of Tennessee, in accordance with 49 U.S.C. 31315(b)(7) and 31136(e), and we welcome comments from State officials.

Authority: 49 U.S.C. 31315 and 31136; 23 U.S.C. 315; 49 CFR 1.48.

Issued on: May 12, 1999.

Kenneth R. Wykle,

Federal Highway Administrator.

[FR Doc. 99-12464 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA DOCKET NO. FHWA-99-5578]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of petitions and intent to grant applications for exemption; request for comments.

SUMMARY: This notice announces the FHWA's preliminary determination to grant the applications of 32 individuals for an exemption from the vision requirements in the Federal Motor Carrier Safety Regulations (FMCSRs). Granting the exemptions will enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the vision standard prescribed in 49 CFR 391.41(b)(10).

DATES: Comments must be received on or before June 17, 1999.

ADDRESSES: Your written, signed comments must refer to the docket number at the top of this document, and you must submit the comments to the Docket Clerk, U.S. DOT Dockets, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. All comments will be available for examination at the above address between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

FOR FURTHER INFORMATION CONTACT: For information about the vision exemptions in this notice, Ms. Sandra Zywockarte, Office of Motor Carrier Research and Standards, (202) 366-2987; for information about legal issues related to this notice, Ms. Judith Rutledge, Office of the Chief Counsel, (202) 366-0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users may access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the Office of the **Federal Register's** home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's database at: <http://www.access.gpo.gov/nara>.

Background

Thirty-two individuals have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Under 49 U.S.C. 31315 and 31136(e), the FHWA may grant an exemption for a renewable 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." Accordingly, the FHWA has evaluated each of the 32 exemption requests on its merits, as required by 49 U.S.C. 31315 and 31136(e), and preliminarily determined that exempting these 32 applicants from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption.

Qualifications of Applicants

1. Grady Lee Black, Jr.

Mr. Black is a 46-year-old individual who has operated CMVs for 24 years. He has had a congenital irregularity called amblyopia ("lazy eye") in his right eye since birth, according to his optometrist. Because of this condition, Mr. Black is unable to meet the vision requirement in 49 CFR 391.41(b)(10).

A 1999 examination by the optometrist reveals Mr. Black has 20/30 vision in his left eye with glasses. In the optometrist's opinion, Mr. Black has sufficient vision to perform the tasks necessary to operate a CMV.

Mr. Black holds a Mississippi commercial driver's license (CDL) with a tank vehicle endorsement. He has driven tractor-trailer combinations more than 2 million miles since 1975, and his official driving record for the past 3 years contains one speeding ticket and no accidents.

2. Marvin E. Brock

In the words of his optometrist, Mr. Brock, 64, has "long-standing" amblyopia in his right eye. Because the eye condition is an old one, he has had many years to adapt his driving skills to accommodate his vision deficiency. A

1998 medical examination indicates he has 20/25 vision in his left eye with glasses. In the optometrist's opinion, Mr. Brock is capable of operating a CMV safely.

Mr. Brock has been a professional truck driver for 24 years and has driven tractor-trailer combinations more than 2 million miles. He holds a California CDL, and his official State driving record reflects no moving violations and no accidents in any vehicle in the last 3 years.

3. Roosevelt Bryant, Jr.

Mr. Bryant is 49 years old and has been employed as a commercial truck driver for 25 years. He has been blind in his left eye since 1979 and therefore cannot meet the vision requirement of 49 CFR 391.41(b)(10).

A 1999 examination indicates Mr. Bryant has 20/20 vision in his right eye without glasses. In his optometrist's opinion, Mr. Bryant is capable of operating a CMV safely.

Mr. Bryant holds a Georgia CDL. He has driven CMVs more than 2 million miles since 1974. His official driving record for the past 3 years reflects no traffic violations and no accidents in any vehicle. Mr. Bryant has operated tractor-trailer combinations for Truck and Trailer Leasing Corporation since May 1979; the president of the company calls him "a dependable, conscientious, hard-working employee."

4. John Alex Chizmar

Mr. Chizmar, 47, has amblyopia in his right eye. The vision in his left eye was 20/15 with glasses in a 1998 examination. His optometrist says Mr. Chizmar is able to perform the tasks necessary to operate a CMV.

Mr. Chizmar has an Ohio CDL. He has driven straight trucks and tractor-trailer combinations in 20 years as a professional driver. His official State driving record for the past 3 years contains no traffic violations and no accidents in a CMV.

5. Billy M. Coker

Mr. Coker, 59, has been employed as a commercial truck driver for 30 years. He has been blind in his left eye since he was a child.

A 1999 medical report indicates Mr. Coker has 20/20 vision in the right eye with corrective lenses. His optometrist states Mr. Coker has the skills to operate a CMV. Having been blind in one eye since childhood, he has had almost his entire life to adapt to it.

He has driven tractor-trailer combinations 3 million miles since 1969. Mr. Coker holds a Tennessee CDL, and his driving record for the past 3

years reflects no traffic violations and no accidents.

6. Cliff Dovel

Mr. Dovel, 46, had his right eye removed in 1993 due to intraocular cancer. A 1999 examination by an ophthalmologist revealed the vision in his left eye to be 20/20 without correction. The ophthalmologist stated Mr. Dovel has sufficient vision to perform the driving tasks associated with a CMV.

Mr. Dovel holds a Washington CDL with a tank vehicle endorsement. He has operated straight trucks and tractor-trailer combinations during a professional driving career spanning more than 20 years. His official State driving record reflects no traffic citations and no accidents in any vehicle for the past 3 years. A statement from Gary Davis Trucking Inc., Mr. Dovel's employer since 1991, refers to him as "an exemplary employee" whose "driving record is excellent."

7. George T. Ellis, Jr.

Mr. Ellis, 55, lost the sight in his left eye in 1980. His vision in the right eye is 20/20 with glasses, according to a 1998 examination. His optometrist states Mr. Ellis can perform the tasks necessary to operate a CMV.

Mr. Ellis holds a Virginia CDL. He is a self-employed owner-operator who has driven straight trucks and tractor-trailer combination vehicles during a 20-year career. For the last 8 years, he has operated tractor-trailers an average of 80,000 miles a year. His official State driving record reveals no traffic citations or accidents in any vehicle in the last 3 years.

8. Weldon R. Evans

Mr. Evans, 32, has had amblyopia in his right eye since birth. Because of this eye condition, Mr. Evans is unable to meet the Federal vision requirement. His left eye was measured at 20/20 with glasses in a 1998 examination, and the optometrist says Mr. Evans "has more than adequate vision to safely perform any driving task" in a CMV.

Weldon Evans holds an Ohio CDL with a tank vehicle endorsement. He has operated tractor-trailer combination vehicles for 8 years and has driven them more than 700,000 miles. His official State driving record lists one moving violation and no accidents in a CMV in the last 3 years. The safety director at his employer since 1995, Total Xpress, writes that Mr. Evans "has been a safe and conscientious driver" for the company.

9. Richard L. Gagnebin

Mr. Gagnebin is a 49-year-old individual who has been blind in his left eye since he was about 19. He has 20/20 unaided vision in his right eye, according to a 1999 examination. The ophthalmologist who conducted the examination asserts Mr. Gagnebin has sufficient vision to drive a CMV.

Mr. Gagnebin has 9 years' experience operating tractor-trailer combinations and 18 years of experience driving straight trucks. He holds a Kansas CDL with a tank vehicle endorsement and has had no traffic violations or accidents in a CMV in the past 3 years. Like the other applicants, Mr. Gagnebin's safe driving record indicates he has adjusted successfully to his vision impairment.

10. James P. Guth

Mr. Guth is a 44-year-old man who has had amblyopia in his left eye since childhood. He has 20/15 vision in his right eye with corrective lenses and 20/20 uncorrected. An optometrist examined him in 1998 and stated Mr. Guth is able to operate a CMV safely.

Mr. Guth has 16 years of experience operating tractor-trailer combinations and 7 years' experience operating straight trucks. He holds a Pennsylvania CDL with tank vehicle and passenger endorsements and has driven more than 2 million miles in commercial vehicles. He has no traffic citations or accidents in any vehicle on his official driving record for the past 3 years.

11. James J. Hewitt

Mr. Hewitt, 33, has had amblyopia in his left eye since birth. The vision in his right eye is 20/20 without glasses, according to a 1999 examination. His ophthalmologist states Mr. Hewitt is able to perform the duties of a CMV driver.

Mr. Hewitt has a Wisconsin CDL with tank vehicle and hazardous materials endorsements. He has operated tractor-trailer combination vehicles for 4 years and has accumulated more than 350,000 miles behind the wheel. His official State driving record reveals no accidents or citations in any vehicle for the past 3 years. This safe driving record indicates Mr. Hewitt has adapted successfully to a vision impairment he has had all his life.

12. Paul M. Hoerner

Mr. Hoerner, 58, has had amblyopia in his left eye since childhood. The vision in his right eye was 20/30 with glasses in a 1999 examination. His ophthalmologist says Mr. Hoerner has sufficient vision to perform the tasks necessary to operate a CMV.

Mr. Hoerner holds a South Dakota CDL with a tank vehicle/hazardous materials endorsement. He has 40 years' experience driving straight trucks and has driven tractor-trailer combinations for 15 years. His official State driving record contains no traffic violations and no accidents in any vehicle in the past 3 years.

13. Carroll Joseph Ledet

Mr. Ledet, 48, has a cataract condition in his left eye which prevents him from meeting the Federal vision standard. The condition has existed since he was 12 years old. An optometrist examined him in 1999 and found Mr. Ledet's vision in the right eye to be 20/20 without glasses. The optometrist says Mr. Ledet is able to perform the tasks required to operate a CMV.

Mr. Ledet has a Louisiana CDL with a tank vehicle/hazardous materials endorsement. He has been a professional truck driver for 19 years and has driven tractor-trailer combination vehicles more than 800,000 miles. There are no traffic violations or accidents in any vehicle in the past 3 years on his official driving record.

14. Charles L. Lovern

Mr. Lovern, 49, has had a lesion on the retina in his left eye since early childhood, thus making him unable to meet the Federal vision standard in 49 CFR 391.41(b)(10). An optometrist examined him in 1999 and found the vision in his right eye to be 20/20 without glasses. The optometrist states Mr. Lovern has sufficient vision to "operate any commercial vehicle safely."

Mr. Lovern has a Tennessee CDL with a tank vehicle endorsement and has operated straight trucks for 9 years and tractor-trailer combinations for almost 3 years. His official driving record for the past 3 years reveals one accident and no traffic violations in a CMV. The 1996 accident caused damage to Mr. Lovern's truck; however, there were no injuries and no other vehicle was involved. He was not issued a citation.

15. Craig M. Mahaffey

Mr. Mahaffey is a 25-year-old individual who was born with a cataract on his right eye. This prevents him from meeting the Federal vision requirement. Mr. Mahaffey has 20/20 vision in his left eye with corrective lenses, according to a 1999 examination. The ophthalmologist who conducted the examination asserts Mr. Mahaffey has sufficient vision "to safely operate a commercial vehicle."

Mr. Mahaffey has 3 years' experience operating straight trucks and 6 years'

experience operating tractor-trailer combinations for two Ohio companies. He has driven these CMVs almost 300,000 miles. He holds an Ohio CDL with a tank vehicle endorsement and has no traffic violations or accidents in any vehicle on his official State driving record. One of his employers reports Mr. Mahaffey has received its "Excellence without Incident" award since 1992. Mr. Mahaffey's safe driving record is testimony to the fact he has successfully adapted his driving techniques to his vision impairment.

16. Michael S. Maki

Mr. Maki, 33, has had amblyopia in his right eye since birth. Vision in the left eye is 20/20 with glasses, according to a 1998 examination. His optometrist states Mr. Maki "has demonstrated . . . he is able to safely operate" a CMV and "nothing found in this visual examination would indicate that he is no longer able" to do so.

Mr. Maki holds a Minnesota CDL. He has operated a CMV for United Parcel Service for 6 years, and the company's terminal manager calls him a "valued part of our organization." Mr. Maki's official State driving record reveals no traffic citations or accidents in any vehicle in the past 3 years.

17. Gerald Wayne McGuire

Mr. McGuire, 53, has had amblyopia in his left eye since childhood. A 1999 examination by an optometrist confirmed vision in the right eye to be 20/20 with glasses. The optometrist believes Mr. McGuire is able to perform the tasks required to operate a CMV.

Mr. McGuire holds a Colorado CDL. He has operated straight trucks for 3 years and tractor-trailer combinations for 5 years, driving a total of 550,000 miles in CMVs. His employer, Western Freightways, Inc., calls him "very dependable and safe." There are no moving violations in any vehicle and one accident in a CMV in the past 3 years on his official driving record. In that accident, Mr. McGuire's truck was hit in the rear by a vehicle. No citation was issued to him.

18. Eldon Miles

Mr. Miles, 49, has had a scar on his right eye since 1992 which prevents him from meeting the Federal vision standard. His left eye was measured at 20/15 with glasses in a 1999 examination, and the optometrist asserts Mr. Miles can perform the tasks required to operate a CMV.

Eldon Miles has an Indiana CDL with a hazardous materials/tank vehicle endorsement. He has operated straight trucks and tractor-trailer combination

vehicles for 27 years. In the 7 years since he developed the scar on his eye, Mr. Miles has driven CMVs more than 400,000 miles. There are no traffic violations or accidents in any vehicle on his official State driving record for the past 3 years.

19. Craig W. Miller

Mr. Miller, 43, has been a commercial truck driver for 18 years and has driven for the same company for 15 of them. He has had a macular scar on his right eye since 1992 and cannot meet the Federal vision requirement. A 1998 medical examination indicates Mr. Miller has 20/20 vision in the left eye without corrective lenses. His ophthalmologist states Mr. Miller can perform the tasks required to operate a CMV.

He has driven tractor-trailer combinations and straight trucks approximately 500,000 miles in his career. He has a Missouri CDL with a tank vehicle/hazardous materials endorsement, and his official driving record for the past 3 years reflects no traffic violations and no accidents in any vehicle.

20. Walter F. Moniowczak

Mr. Moniowczak lost the sight in his left eye in 1956. According to a 1999 examination, his right eye is 20/20 without the need for glasses. His ophthalmologist states Mr. Moniowczak can perform the tasks associated with driving a CMV.

Mr. Moniowczak is 62 years old and holds a Michigan CDL with a tank vehicle endorsement. He has operated tractor-trailer combinations for more than 40 years and has driven 4 million miles. He has worked for the same company for the past 42 years, and the company's president says Mr. Moniowczak is "a great asset . . . with his excellent driving record."

There are no moving violations in any vehicle and one accident in a CMV in the past 3 years on his official driving record. In that accident, Mr. Moniowczak was driving his truck on an icy road during a snowstorm. He drove onto the shoulder to avoid vehicles stopped in front of him, and his truck sustained minor damage. There were no injuries and Mr. Moniowczak was not issued a citation.

21. Howard R. Payne

Mr. Payne, 60, was hit in the left eye with a baseball bat as a child. He is unable to meet the Federal vision standard. An optometrist examined him in 1999 and found the vision in Mr. Payne's right eye to be 20/20 unaided. The optometrist writes that he "sees no

reason" why Mr. Payne cannot continue to operate a CMV safely.

Mr. Payne holds a Minnesota CDL. He has been a professional truck driver for 12 years and has driven tractor-trailer combination vehicles almost 600,000 miles. His official driving record for the past 3 years contains one speeding ticket in a CMV and no accidents in any vehicle.

22. Kenneth Adam Reddick

Mr. Reddick, 35, has had amblyopia in his left eye since childhood. A 1999 examination by an optometrist revealed vision in the right eye to be 20/20 with corrective lenses. The optometrist believes Mr. Reddick has sufficient vision to operate a CMV and noted his "very long and safe record."

Mr. Reddick has a Pennsylvania CDL with a hazardous materials/tank vehicle endorsement. In his 14 years as a professional driver, he has driven straight trucks and tractor-trailer combinations almost 1 million miles. His official State driving record for the past 3 years contains no traffic violations and no accidents in any vehicle.

23. Leonard Rice, Jr.

Mr. Rice is a 51-year-old man who had his right eye removed when he was 3 months old. He has 20/20 vision in his left eye without corrective lenses. An optometrist examined him in 1998 and asserted Mr. Rice has sufficient vision to operate a CMV.

Mr. Rice holds a Georgia CDL with tank vehicle/hazardous materials and passenger endorsements. He has driven tractor-trailer combinations and straight trucks more than 1 million miles in a 35-year professional driving career. There are no traffic violations or accidents in any vehicle on his official driving record for the past 3 years.

Mr. Rice received a safe driving award from one of his employers and compliments on his safe driving from others. His record indicates he has successfully adapted his driving techniques to a vision impairment he has had all his life.

24. Willard L. Riggle

Mr. Riggle, 52, suffered an injury to his right eye when he was 8, resulting in a macular scar. A 1999 examination by an ophthalmologist revealed the vision in his left eye to be 20/15 with correction. The ophthalmologist stated Mr. Riggle has "sufficient vision to safely operate" a CMV.

Mr. Riggle holds an Indiana CDL. He has 12 years' experience operating straight trucks and has operated tractor-trailer combinations for 18 years,

accumulating almost 2 million miles in CMVs. Mr. Riggle's official State driving record reflects no traffic violations or accidents in any vehicle in the past 3 years.

25. John A. Sortman

Mr. Sortman, 48, has had a macular defect in his right eye since birth. This condition prevents him from meeting the Federal vision requirement. A 1998 medical report indicates he has 20/20 vision in his left eye with glasses. In his optometrist's opinion, Mr. Sortman is capable of operating a CMV.

Mr. Sortman has operated straight trucks and tractor-trailer combinations professionally for 26 years. He has an Ohio CDL with a hazardous materials endorsement, and his official driving record for the past 3 years reflects no traffic violations or accidents in any vehicle.

26. James Archie Strickland

Mr. Strickland is a 44-year-old individual who lost his left eye in 1993 due to malignant melanoma. He has 20/15 vision in his right eye without glasses, according to a 1999 examination by an ophthalmologist. The ophthalmologist states Mr. Strickland's vision in the right eye "permits normal, unrestricted operation" of a CMV.

Mr. Strickland holds a North Carolina CDL with a tank vehicle/hazardous materials endorsement. He has driven straight trucks and tractor-trailer combinations almost 500,000 miles since he began his professional driving career in 1991. His official State driving record contains no traffic violations and no accidents in a CMV in the past 3 years.

27. James Terry Sullivan

Mr. Sullivan, 40, has amblyopia in his left eye. Because of this condition, Mr. Sullivan is unable to meet the vision requirement in 49 CFR 391.41(b)(10). A 1998 medical examination indicates he has 20/15 vision in his right eye with glasses. In his optometrist's opinion, Mr. Sullivan has sufficient vision to operate a CMV.

Mr. Sullivan has been a professional truck driver for 11 years and has operated straight trucks and tractor-trailer combinations. He holds a Kentucky CDL with a tank vehicle endorsement, and his official State driving record reflects no traffic violations or accidents in any vehicle for the past 3 years.

28. Edward A. Vanderhei

Mr. Vanderhei is 44 years old and has been employed as a commercial truck driver for 20 years. The optic nerve in

his right eye was damaged in 1992, leaving him blind in that eye. An optometrist examined him in 1999 and reports the vision in Mr. Vanderhei's left eye to be 20/20 without correction. In the optometrist's opinion, Mr. Vanderhei "has very good distance [and] peripheral vision" and is capable of operating a CMV.

Mr. Vanderhei holds an Illinois CDL and has driven tractor-trailer combination vehicles more than 1.2 million miles in his career. His official driving record for the past 3 years reflects no traffic violations or accidents in any vehicle. Mr. Vanderhei's employer says he "has performed his duties accident-free and is a valued employee."

29. Buford C. Varnadore

Mr. Varnadore, 72, injured his left eye when he was 14 and has been virtually blind in the eye since then. A 1999 medical examination indicates Mr. Varnadore has 20/30 vision in the right eye without corrective lenses. He has sufficient vision to operate a CMV, according to his optometrist. Having been blind in one eye since he was a teenager, Mr. Varnadore has had almost his entire life to adapt to it.

He has been a professional truck driver more than 41 years and has driven tractor-trailer combinations 2.4 million miles since 1957. Mr. Varnadore holds a North Carolina CDL; his official driving record for the past 3 years reflects no traffic violations and no accidents in any vehicle.

30. Kevin P. Weinhold

Mr. Weinhold, 48, has amblyopia in his left eye. Vision in the right eye was 20/20 with glasses in a 1999 examination. His ophthalmologist states Mr. Weinhold is able to operate a CMV "and control [it] safely."

Mr. Weinhold has a Massachusetts CDL and has 30 years' experience operating CMVs, 10 years with straight trucks and 20 more with tractor-trailer combinations. His official State driving record for the past 3 years reflects no traffic violations and no accidents in any vehicle. He has worked for Pacific Packaging Products, Inc., since 1984, and its chief financial officer says the company has "routinely given Kevin its safe driving awards."

31. Thomas A. Wise

Mr. Wise, 56, has been employed as a commercial truck driver for 30 years. He has had a macular scar in his right eye since he was a child. A 1999 medical report indicates Mr. Wise has 20/20 vision in the left eye with corrective lenses. His optometrist states

Mr. Wise has sufficient vision to operate a CMV.

He has driven tractor-trailer combination vehicles more than 1.5 million miles during his professional career. He has a Colorado CDL, and his official driving record for the past 3 years contains one moving violation in a CMV and no accidents in any vehicle. Mr. Wise has driven trucks for Welby Gardens since 1984. The company's general manager says he has performed his "driving responsibilities safely and efficiently."

32. Rayford R. Harper

Mr. Harper is a 44-year-old individual who has operated CMVs for more than 23 years. He has amblyopia in his left eye, according to his optometrist. Because of this condition, Mr. Harper is unable to meet the Federal vision requirement. A 1999 examination by the optometrist reveals Mr. Harper has 20/20 vision in his right eye without glasses. In the optometrist's opinion, Mr. Harper's vision impairment does not affect his ability to operate a CMV.

He has driven straight trucks and tractor-trailer combinations more than 2.5 million miles in his career. He holds an Alabama CDL, and his official driving record for the past 3 years contains no traffic violations and no accidents in any vehicle.

Basis for Preliminary Determination To Grant Exemptions

Independent studies support the principle that past driving performance is a reliable indicator of an individual's future safety record. The studies are filed in FHWA Docket No. FHWA-97-2625 and discussed at 63 FR 1524, 1525 (January 9, 1998). We believe we can properly apply the principle to monocular drivers because data from the vision waiver program clearly demonstrate the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively. (See 61 FR 13338, March 26, 1996.) That monocular drivers in the waiver program demonstrated their ability to drive safely supports a conclusion that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely.

The 32 applicants have qualifications similar to those possessed by drivers in the waiver program. Their experience and safe driving record operating CMVs demonstrate that they have adapted their driving skills to accommodate their vision deficiency. Since past driving records are reliable precursors of the future, there is no reason to expect

these individuals to drive less safely after receiving their exemptions. Indeed, there is every reason to expect at least the same level of safety, if not a greater level, because the applicants can have their exemptions revoked if they compile an unsafe driving record.

For these reasons, the FHWA believes exempting the individuals from 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption as long as vision in their better eye continues to meet the standard specified in Section 391.41(b)(10). As a condition of the exemption, therefore, the FHWA proposes to impose requirements on the individuals similar to the grandfathering provisions in 49 CFR 391.64(b) applied to drivers who participated in the agency's former vision waiver program.

These requirements are: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that vision in the better eye meets the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to his or her employer for retention in its driver qualification file or keep a copy in his or her driver qualification file if he or she becomes self-employed. The driver must also have a copy of the certification when driving so it may be presented to a duly authorized Federal, State, or local enforcement official.

In accordance with 49 U.S.C. 31315 and 31136(e), the proposed exemption for each person will be valid for 2 years unless revoked earlier by the FHWA. The exemption will be revoked if: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136. If the exemption is effective at the end of the 2-year period, the person may apply to the FHWA for a renewal under procedures in effect at that time.

Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), the FHWA is requesting public comment from all interested persons on the exemption petitions and the matters discussed in this notice. All

comments received before the close of business on the closing date indicated above will be considered and will be available for examination in the docket room at the above address. Comments received after the closing date will be filed in the docket and will be considered to the extent practicable, but the FHWA may issue exemptions from the vision requirement to the 32 applicants and publish in the **Federal Register** a notice of final determination at any time after the close of the comment period. In addition to late comments, the FHWA will also continue to file in the docket relevant information which becomes available after the closing date. Interested persons should continue to examine the docket for new material.

Authority: 49 U.S.C. 31136 and 31315; 23 U.S.C. 315; 49 CFR 1.48.

Issued on: May 12, 1999.

Kenneth R. Wykle,

Federal Highway Administrator.

[FR Doc. 99-12465 Filed 5-17-99; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-98-4430; Notice 1]

Application for Decision of Inconsequential Noncompliance Federal Motor Vehicle Safety Standard 108—Lamps, Reflective Devices and Associated Equipment

General Motors Corporation (GM), has determined that approximately 15,300 1998 GMC Sonoma and Chevrolet S-10 pickup trucks, and GMC Jimmy and Chevrolet Blazer sport utility vehicles, equipped with the "ZR2" option package, fail to meet a requirement of

Federal Motor Vehicle Safety Standard (FMVSS) 108—*Lamps, Reflective Devices and Associated Equipment*. Specifically, these vehicles are equipped with daytime running lamps (DRLs) mounted higher than the maximum height allowed by S5.5.11(a)(1)(ii) of FMVSS 108. Pursuant to 49 U.S.C. 30118 and 30120, GM has applied to the National Highway Traffic Safety Administration (NHTSA) for a decision that the noncompliance is inconsequential to motor vehicle safety.

GM has also submitted a 49 CFR Part 573 noncompliance notification to the agency in accordance with 49 CFR 556.4(b)(6).

This notice of receipt of an application is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the application.

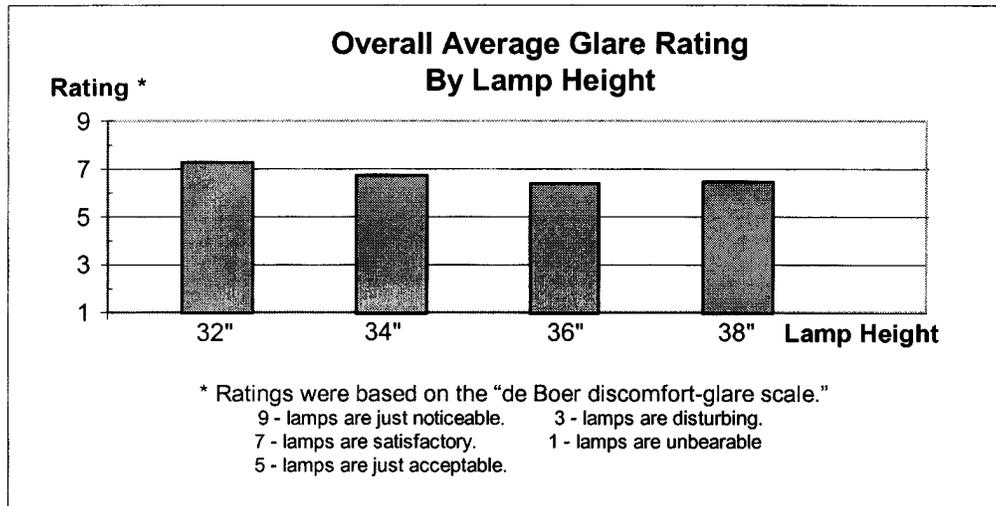
The DRLs on the noncompliant vehicles are provided by the upper beam headlamps operating at reduced intensity, with a maximum output of approximately 6,700 candela per lamp. As such, FMVSS 108 requires the DRL be mounted not higher than 34 inches (864 mm) from the road surface. Base-level GMC Sonomas and Jimmys and Chevrolet S-10 pickups and Blazers comply with the DRL height limitation of FMVSS 108. However, the ZR2 option package gives the vehicles a stiffer suspension and larger tires, which results in an over-all increase in the height of the vehicle, including the DRL mounting height. The mean mounting height of DRLs on the noncompliant vehicles is 36 inches above the ground, with a maximum height of 37 inches. As a result, they fail to meet S5.5.11(a)(1)(ii) of FMVSS 108.

GM believes that this noncompliance is inconsequential to motor vehicle safety for the following reasons:

1. Research conducted by the University of Michigan Transportation Research Institute (UMTRI) on the changes in glare caused by varying mounting height of high beam DRLs confirms that the DRLs on the subject vehicles do not produce significantly more glare than compliant DRLs. In a report published in November of 1995 (UMTRI-95-40), the researchers concluded glare is not appreciably affected by mounting height. In other words, vehicles equipped with DRL lamps not meeting the maximum height restriction do not cause any more glare than vehicles that meet the height restriction. This is true even though the research was conducted on lamps mounted as high as 54 inches above the ground.

2. In addition to the UMTRI research, GM conducted subjective evaluations that confirm the DRLs on the non-complying vehicles do not cause a consequential increase in glare. Vehicles representative of the subject vehicles were modified to create DRLs with mounting heights of 32, 34, 36 and 38 inches above the ground. Subjects were asked to evaluate the glare in their rearview mirror from the DRLs. The results indicate that there is no significant difference in glare rating when the subject lamps are mounted at 32, 34, 36 or 38 inches above the ground (see chart below). While a final research report is not yet available, a summary of the research can be found in Appendix 2, to the petition. The subject lamps received favorable ratings when evaluated for glare. In the chart above, the lamps mounted at 36 and 38 inches above the ground received an overall rating of 6.4, which is just below a rating of 7 ("lamps are satisfactory") and well above a rating of 5 ("lamps are just acceptable").

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3. The driver of a preceding vehicle will not see more light in the rearview mirror than NHTSA intended when it adopted the DRL requirements. In the preamble to the final rule allowing DRLs (Docket No. 87-6; Notice 5 published January 11, 1993), the agency summarized a study it conducted to help establish the height requirement. One of the purposes of the study was to assure that a mirror of a vehicle in front of a DRL-equipped vehicle would not be exposed to light intensities greater than 2600 cd. In justifying the 2600 cd limit, the agency explained,

"There are two kinds of glare: That which discomforts and that which disables. The agency proposed 2,600 candela to limit discomfort glare from the rear view mirror caused by vehicles with DRLs following closely behind."

The agency assures the glare will be below a level that could interfere with motor vehicle safety by limiting the value to 2600 cd.

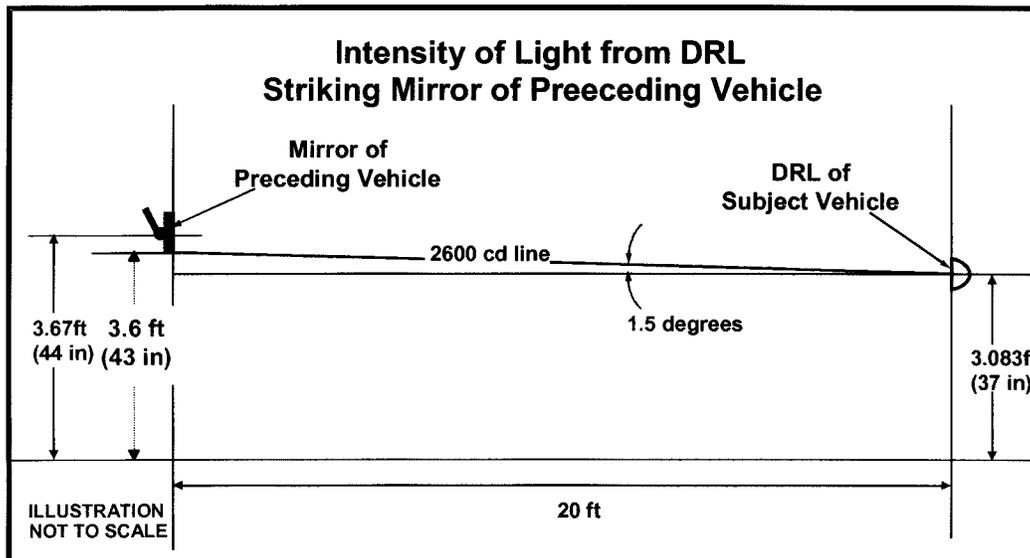
To establish the height where a DRL might generate 2600 cd in the mirror of a preceding vehicle, the agency measured the mirror height (44 inches) of a representative small vehicle and calculated the light that would strike the mirror from a DRL lamp mounted on a vehicle 20 feet behind it. Based on this analysis, the agency concluded a maximum high beam DRL mounting height of 34 inches would assure that light striking the mirror of a preceding vehicle would not exceed 2600 cd.

GM evaluated light from the noncomplying vehicles with the DRL mounted at 37 inches, which is in the most extreme build condition and worst

case, for purposes of this analysis. The light from this condition striking a mirror mounted 44 inches above the ground and 20 feet in front of the DRL, would be below the 2600 candela limit established by the agency in the final DRL rule.

4. The DRLs of the non complying vehicles form a very compact beam pattern. Iso-candela curves show the intensity of the beam pattern quickly drops off as values are measured further from the center of the beam pattern. At approximately 1½ degrees above horizontal, the beam pattern intensity falls below 2600 candela. Therefore, the driver of a preceding vehicles will not see significant light in the rear view mirror (see diagram below).

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5. The mounting height of the DRLs on the non complying vehicles complies with the requirements of Canada Motor Vehicle Safety Standard (CMVSS) 108.

6. GM has not identified any accidents, injuries or warranty reports that are associated with this condition on the non complying vehicles.

For all of the above reasons, GM argues that this noncompliance is inconsequential to motor vehicle safety. In consideration of the foregoing, GM has applied for a decision that it be exempted from the notification and remedy provisions of 49 USC 30118 and 30120 for this specific noncompliance with FMVSS No.108.

Interested persons are invited to submit written data, views, and arguments on the application described above. Comments should refer to the docket number and be submitted to: Docket Management, Room PL-401, 400 Seventh Street, SW, Washington, DC 20590. It is requested but not required that six copies be submitted. Docket hours are 10:00 A.M. to 5:00 P.M.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date, will also be filed and will be considered to the extent practicable. When the application is granted or denied, the notice will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: June 17, 1999.

(49 U.S.C. 30118 and 30120; delegations of authority at 49 CFR 1.50 and 501.8)

Issued on: May 12, 1999.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 99-12467 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-99-5056; Notice 1]

Application for Determination of Inconsequential Noncompliance to Federal Motor Vehicle Safety Standard 108—Lamps, Reflective Devices and Associated Equipment

General Motors Corporation (GM), has determined 1997 GM S10 Electric Trucks (S10 trucks equipped with an electric propulsion system) fail to meet the turn signal bulb outage requirements

found in S5.5.6 of Federal Motor Vehicle Safety Standard (FMVSS) 108—*Lamps, Reflective Devices and Associated Equipment*. Pursuant to Title 49 of the United States Code, Sections 30118 and 30120, GM has petitioned the National Highway Traffic Safety Administration (NHTSA) for a decision that the noncompliance is inconsequential as its relates to motor vehicle safety. In accordance with 49 CFR 556.4(b)(6), GM has also submitted a 49 CFR 573.5 noncompliance notification to the agency .

This notice of receipt of an application is published under 49 U.S.C. 30118 and 30120 and does not represent an agency decision or other exercise of judgement concerning the merits of the application.

FMVSS 108 S5.5.6 requires:

S5.5.6 Each vehicle equipped with a turn signal operating unit shall also have an illuminated pilot indicator. Failure of one or more turn signal lamps to operate shall be indicated in accordance with SAE Standard J588e, Turn Signal Lamps, September 1970, except when a variable-load turn signal flasher is used on a truck, bus, or multipurpose passenger vehicle 80 or more inches in overall width, on a truck that is capable of accommodating a slide-in camper, or on any vehicle equipped to tow trailers.

The design of the S10 Electric Truck is based on the design of conventional S10 trucks powered by internal combustion engines, with modifications to accommodate the electric propulsion system. The conventional S10 trucks are capable of towing, have a variable load flasher, and, therefore, are not required by the Standard to provide bulb outage indication. The use of an S10 Electric Truck for towing is not practical and is not recommended. The impact of that fact was overlooked in the process of carrying over the design of the turn signal system from the conventional S10 to the S10 Electric and, therefore, the non complying vehicles were not equipped to indicate bulb outage and do not meet that requirement of FMVSS 108 S5.5.6. This was corrected in the 1998 model year production of the S10 Electric.

GM believes that this noncompliance is inconsequential to motor vehicle safety for these reasons:

The S10 Electric Trucks are identical in appearance to the normal production vehicles. Except for the lack of towing capability, the subject vehicles are functionally the same as fully compliant S10 trucks.

There were only 209 vehicles produced and, therefore, the exposure is extremely small.

Most of the subject vehicles are part of commercial and government fleets (they have

been purchased by electric utility companies and state and municipal government agencies). As such, they will be exposed to routine maintenance schedules that are more rigorous than the average consumer practices.

Most trucks currently produced are capable of trailer towing and, thus, are not required to detect bulb outage. As a result, individuals and fleets who are accustomed to truck operation do not necessarily have an expectation that turn signal bulb outage will be indicated. In addition, other lamps required by FMVSS 108 are not required to provide bulb outage indication. As a result, the lack of that feature on these vehicles is not likely to be noticed by the vehicle operators, and they will continue to discover turn signal bulb outage the way they would on other trucks that are capable of towing.

GM is not aware of field complaints due to the subject condition.

GM asserts that the noncomplying trucks present the same level of safety as the millions of other vehicles with variable load flashers currently on the roads and highways. GM thus argues that this noncompliance is inconsequential as it relates to motor vehicle safety. In consideration of the foregoing, GM petitions that it be exempted from the notification and remedy provisions of the Safety Act for this specific noncompliance with FMVSS No. 108.

Interested persons are invited to submit written data, views, and arguments on the application described above. Comments should refer to the docket number and be submitted to: Docket Management, Room PL-401, 400 Seventh Street, SW, Washington, DC 20590. It is requested but not required that six copies be submitted. Docket hours are 10:00 A.M. to 5:00 P.M.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date, will also be filed and will be considered to the extent possible. When the application is granted or denied, the notice will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: June 17, 1999.

(49 U.S.C. 30118 and 30120; delegations of authority at 49 CFR 1.50 and 501.8)

Issued on: May 12, 1999.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 99-12466 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION**Surface Transportation Board**

[STB Ex Parte No. 558 (Sub-No. 2)]

Railroad Cost of Capital—1998**AGENCY:** Surface Transportation Board, Transportation.**ACTION:** Notice of decision.

SUMMARY: On May 17, 1999, the Board served a decision to update its computation of the railroad industry's cost of capital for 1998. The composite after-tax cost of capital rate for 1998 is found to be 10.7%, based on a current cost of debt of 6.64%; a cost of common equity capital of 13.11%; a cost of preferred equity capital of 6.19%; and a capital structure mix comprised of 36.01% debt, 62.64% common equity, and 1.35% preferred equity. The cost of capital finding made in this proceeding will be used in a variety of Board proceedings.

EFFECTIVE DATE: This action is effective May 17, 1999.**FOR FURTHER INFORMATION CONTACT:** Leonard J. Blistein, (202) 565-1529. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: The cost of capital finding in this decision shall be used for a variety of regulatory purposes. To obtain a copy of the full decision, write to, call, or pick up in person from: DC NEWS & DATA, INC., Room 210, 1925 K Street, NW, Washington, DC 20423. Telephone: (202) 289-4357. [Assistance for the hearing impaired is available through TDD services (202) 565-1695.] The decision is also available on the Board's internet site at www.stb.dot.gov.

Environmental and Energy Considerations

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Regulatory Flexibility Analysis

Pursuant to 5 U.S.C. 605(b), we conclude that our action in this proceeding will not have a significant economic impact on a substantial number of small entities. The purpose and effect of this action are to update the annual railroad industry cost of capital finding by the Board. No new reporting or other regulatory requirements are imposed, directly or indirectly, on small entities.

Authority: 49 U.S.C. 10704(a).
Decided: May 6, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams,*Secretary.*

[FR Doc. 99-12468 Filed 5-17-99; 8:45 am]

BILLING CODE 4915-00-P

UNITED STATES INFORMATION AGENCY**Submission for OMB Review; Comment Request****AGENCY:** United States Information Agency.**ACTION:** Submission for OMB Review and Comment Request of Proposed New Collection.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 [Pub. L. 104-13; 44 U.S.C. 3506(c)(2)(A)], this notice announces that the following information collection activity has been forwarded to the Office of Management and Budget (OMB) for review and comment. The United States Information Agency (USIA) is requesting OMB approval of a new information collection entitled, "USIA Grantee/Customer Survey" through December 1999. Also, in accordance with the Paperwork Reduction Act and as part of its continuing effort to reduce paperwork and respondent burden, USIA invites the general public and other Federal agencies to comment on this proposed public use form. Comments are requested on the proposed information collection concerning (a) whether the proposed collection of information is necessary for the proper performance of the agency, including whether the information has practical utility; (b) the accuracy of the Agency's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Send comments regarding this burden estimate or any other aspect of this collection of information to the United States Information Agency, M/AOL, 301 Fourth Street, SW., Washington, DC 20547; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Docket Library, Room 10202, NEOB, Washington, DC 20503, Attention: Desk Officer for USIA.

DATES: Comments are due on or before June 17, 1999.**COPIES:** Copies of the Request for Clearance (OMB 83-I), supporting statement, and other documents that have been submitted to OMB for approval may be obtained from the USIA Clearance Officer.**FOR FURTHER INFORMATION CONTACT:**

Agency Clearance Officer, Ms. Jeannette Giovetti, United States Information Agency, M/AOL, 301 Fourth Street, SW, Washington, DC 20547, telephone (202) 619-4408, Internet address JGiovett@USIA.GOV; and OMB review: Mr. Jefferson Hill, Office of Information And Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Docket Library, Room 1002, NEOB, Washington, DC 20503, telephone (202) 395-5871.

SUPPLEMENTARY INFORMATION: The information collection activity involved with this program is conducted pursuant to the mandate given to the United States Information Agency under the terms and conditions of the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87-256, 22 U.S.C. 2451.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting initial comments on this collection was published on March 23, 1999, vol. 64, no. 55. Public reporting burden for this collection of information (Paper Work Reduction Project: OMB No. 3116-xxxx) is estimated to average ten (10) minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Responses are voluntary but respondents are requested to respond one time.

Current Actions: This information collection has been submitted to OMB for the purpose of requesting approval of this new one-time collection through December 1999.

Title: USIA Grantee/Customer Survey.
Form Number(s): N/A.

Abstract: In support of the Government Performance and Results Act (GPRA) of 1993, USIA's Grants Office proposes to conduct a one-time survey to streamline the grants-making process to consistently identify ways to effectively and efficiently execute grant awards and to enhance the quality of service to our customers in developing future workshops.

Proposed Frequency of Responses:
 No. of Respondents—800
 Recordkeeping Hours—16
 Total Annual Burden—80

Dated: May 12, 1999.

Rose Royal,

Federal Register Liaison.

[FR Doc. 99-12452 Filed 5-17-99; 8:45 am]

BILLING CODE 8230-01-M

UNITED STATES INFORMATION AGENCY

College and University Affiliations Program

ACTION: Notice—Request for Proposals.

SUMMARY: The Office of Academic Programs of the Bureau of Educational and Cultural Affairs in the United States Information Agency announces an open competition for an assistance award program. For applicants' information, on October 1, 1999 the Bureau will become part of the U.S. Department of State without affecting the content of this announcement or the nature of the program described. Accredited, post-secondary educational institutions meeting the provisions described in IRS regulation 26 CFR 1.501(c) may apply to pursue institutional or departmental objectives in international partnerships whose goals will strengthen, through teaching, scholarship, and professional outreach from the partner institutions, mutual understanding and cooperation on specified themes of mutual interest to the United States and eligible foreign institutions. Eligible fields are education or educational administration; the social, political, economic, or environmental sciences; law; business; public administration; or communications. Within these fields, themes of special interest are described in additional detail in the section on "Country Eligibility."

In general, underlying the specific objectives of projects funded by this program should be the goal of fostering freedom and democracy through a deepened mutual understanding of fundamental issues and practical applications in the encouragement of civil society, economic growth and prosperity, environmental cooperation, or the free flow of information. Creative, innovative strategies to address these underlying concerns in the pursuit of clearly defined institutional goals are encouraged. The extension of understanding about these issues through outreach from academic institutions to larger communities of citizens and practitioners is also encouraged.

The Bureau supports institutional linkages in higher education through the College and University Affiliations Program, for which this Request for Proposals invites applications for funding in FY2000. In addition, for the New Independent States of the former Soviet Union, the N.I.S. College and University Partnerships Program Request for Proposals will be issued separately in the summer of 1999 to invite applications for funding in FY2000. For further information about this program see the section of this Request describing eligibility of the N.I.S. under "Country Eligibility."

In the College and University Affiliations Program, partner institutions may pursue specific institutional goals with support from the Bureau of Educational and Cultural Affairs through exchanges of teachers, administrators or, in limited circumstances, students for any appropriate combination of teaching, consultation, research, and outreach, for periods ranging from one week (for planning visits) to an academic year. The Bureau's support may be used to defray the costs of the exchange visits as well as the costs (up to a maximum of 20 percent of the total grant) of their administration at any partner institution, including administrative salaries but excluding indirect costs. Although grants will be issued to eligible U.S. colleges and universities, adequate provision for the administrative costs of the project at all partner institutions is encouraged. Administrative salaries may include salary support for project directors and administrative assistants within the 20 percent maximum that may be allocated to administrative costs, but the Bureau will not fund salaries, stipends, or honoraria for program participants. (See sections of this document on "U.S. Partner and Participant Eligibility" and "Foreign Partner and Participant Eligibility" for details.) The costs of exchange visits of foreign students and U.S. graduate student teaching or research assistants who are working under the supervision of a faculty participant or project director toward the achievement of project objectives are eligible for support. Other students may participate in the project, but not with the Bureau's support for the costs of their visits. With the Bureau's support, institutions may reinforce the activities of exchange participants through the establishment and maintenance of Internet and/or electronic mail communication facilities as well as through interactive technology or non-technology-based distance-learning

programs. Applicants may propose other project activities not specifically anticipated in this solicitation if the activities reinforce exchange activities and their impact.

Proposals must be submitted by the U.S. institutional partner and must include a letter of commitment from the foreign partner(s). While the benefits of the project to each of the participating institutions may differ significantly in nature and scope, proposals should outline well-reasoned strategies leading to specific, demonstrable changes (for example, new courses, new research or teaching capacities or methodologies, new programs or revised curricula) that are anticipated for each participating department or for the institution as a whole as a result of the project. Proposals to pursue a limited number of related thematic objectives at each institution are encouraged over proposals whose thematic goals within each institution are unrelated. The strategy for achieving project goals may include exchange visits in either or both directions, but no single formula is anticipated for the duration, sequence, or number of these visits. However, visits of one semester or more for participants from at least one of the institutional partners are encouraged. Although strong budgetary and programmatic emphasis may be given to visits in one direction over another, the benefits of these visits to the sending as well as the receiving sides should be clearly explained in terms of their contributions to the departmental or institutional objectives which the project is designed to achieve.

In addition to demonstrating the capacity of each participating institution to contribute to its partner(s), proposals should also explain how this cooperation will enable each of the institutions to address its own needs.

Accordingly, applicants are encouraged to describe the needs as well as the capabilities of each participating department. Effective proposals will explain the anticipated cooperation in ways that demonstrate that the institutions proposed for participation in the partnership clearly understand one another and are committed to support one another in project implementation. If the proposed partnership would occur within the context of a previous or on-going project, the proposal should explain how the request for Bureau funding would build upon the pre-existing relationship or complement concurrent projects and cooperation. Projects that direct assistance from one institution to another in one direction only are not eligible for consideration.

The commitment of all partner institutions to the proposed project should be reflected in the cost-sharing which they offer in the context of their respective institutional capacities.

To provide adequate time to meet institutional goals, the program awards grants for periods of approximately three years (36 months to 40 months). The maximum award in the FY2000 competition will be \$150,000. Requests for amounts smaller than the maximum are eligible. Grants awarded to organizations with less than four years of experience in conducting international exchange programs will be limited to \$60,000. Grants are subject to the availability of funds for Fiscal Year 2000.

Overall grant-making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87-256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries . . . ; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program cited above is provided through the Fulbright-Hays Act.

Within this authority, the College and University Affiliations Program operates in cooperation with the Fulbright Senior Scholar Program; current and former participants in the Fulbright Senior Scholar Program are encouraged, together with other college and university teachers with knowledge of educational institutions in other countries, to consider how to build on this knowledge with support from the Bureau through the College and University Affiliations Program.

Projects must conform with the Bureau's requirements and guidelines outlined in the solicitation package for this RFP, which can be obtained by following the instructions given in the section below entitled "For Further Information." The "Project Objectives, Goals, and Implementation" (hereafter, POGI) and the "Project Specific Instructions (hereafter, PSI), which contain additional guidelines, are included in the Solicitation Package. Proposals that do not follow RFP requirements and the guidelines appearing in the POGI and PSI may be

excluded from consideration due to technical ineligibility.

Announcement Title and Number: All communications with the Bureau concerning this announcement should refer to the College and University Affiliations Program and reference number E/ASU-00-01.

Deadline for Proposals: All copies must be received at the Bureau of Educational and Cultural Affairs by 5 p.m. Washington, DC time on Monday, November 15, 1999. Faxed documents will not be accepted, nor will documents postmarked on Monday, November 15, 1999 but received on a later date. It is the responsibility of each applicant to ensure compliance with the deadline.

Approximate program dates: Grant activities should begin on or about May 1, 2000.

Program Duration: May 1, 2000-April 30, 2003 (or until September 30, 2003).

FOR FURTHER INFORMATION CONTACT: Office of Academic Programs; Advising, Teaching, and Specialized Programs Division; College and University Affiliations Program (CUAP), (E/ASU), Room 349, U.S. Information Agency, 301 4th Street, SW., Washington, DC 20547, phone: (202) 619-5289, fax: (202) 401-1433. Send a message via Internet to: affiliat@usia.gov to request a Solicitation Package. The Solicitation Package includes more detailed award criteria; all application forms; and guidelines for preparing proposals, including specific criteria for preparation of the proposal budget.

To Download a Solicitation Package via Internet

The entire Solicitation Package may be downloaded from USIA's website at <http://e.usia.gov/education/rfps>. Please read all information before downloading.

To Receive a Solicitation Package via Fax on Demand

The entire Solicitation Package may be received via the Bureau's "Grants Information Fax on Demand System," which is accessed by calling 202/401-7616. The "Table of Contents" of available documents and order numbers should be the first order when entering the system.

Please specify "College and University Affiliations Program Officer" on all inquiries and correspondence. Prospective applicants should read the complete **Federal Register** announcement before addressing inquiries to the College and University Affiliations Program staff or submitting their proposals. Once the RFP deadline has passed, Agency staff may not

discuss this competition in any way with applicants until the Bureau proposal review process has been completed.

Submissions

Applicants must follow all instructions given in the Solicitation Package. The original and 10 copies of the complete application, including the documents specified under Tabs A through I in the "Project Objectives, Goals, and Implementation" (POGI) section of the Solicitation Package, should be sent to: U.S. Information Agency (until October 1, 1999) or U.S. Department of State (effective October 1, 1999) Ref: E/ASU-00-01, Bureau of Educational and Cultural Affairs, Office of Grants Management, E/XE, Room 326, 301 4th St., SW., Washington, DC 20547.

Applicants must also submit the "Executive Summary" and "Proposal Narrative" sections of the proposal on a 3.5" diskette, formatted for DOS. This material must be provided in ASCII text (DOS) format with a maximum line length of 65 characters. The Bureau will transmit these files electronically to U.S. Embassies overseas for their review, with the goal of reducing the time needed to make the comments of overseas posts available in the Bureau's grant review process.

Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, projects must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and physical challenges. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the "Support for Diversity" section for specific suggestions on incorporating diversity into the total proposal. Public Law 104-319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Proposals should account for advancement of this goal, in their

program contents, to the full extent deemed feasible.

Year 2000 Compliance Requirement (Y2K Requirement)

The Year 2000 (Y2K) issue is a broad operational and accounting problem that could potentially prohibit organizations from processing information in accordance with Federal management and program specific requirements including data exchange with USIA. The inability to process information in accordance with Federal requirements could result in grantees being required to return funds that have not been accounted for properly.

USIA therefore requires all organizations use Y2K compliant systems including hardware, software, and firmware. Systems must accurately process data and dates (calculating, comparing and sequencing) both before and after the beginning of the year 2000 and correctly adjust for leap years.

Additional information addressing the Y2K issue may be found at the General Services Administration's Office of Information Technology website at <http://www.itpolicy.gsa.gov>.

Eligibility

U.S. Partner and Participant Eligibility: In the United States, participation in the program is open to accredited two- and four-year colleges and universities, including graduate schools. Applications from community colleges, minority-serving institutions, undergraduate liberal arts colleges, research universities, and combinations of these types of institutions are eligible. Applications from consortia of U.S. colleges and universities are eligible. Secondary U.S. partners may include non-governmental organizations as well as non-profit service and professional organizations. The lead U.S. organization in the consortium is responsible for submitting the application. Each application from a consortium must document the lead organization's authority to represent the consortium. With the exception of outside evaluators on contract with the U.S. institution, participants representing the U.S. institution who are traveling under the Bureau's grant funds must be teachers, graduate student teaching or research assistants, or administrators from the participating institution(s). Participants representing the U.S. institution must be U.S. citizens. Graduate student teaching or research assistants are eligible for Bureau-funded participation in this program only if they are working under the direction of a faculty participant or

project director on the achievement of project objectives.

Foreign Partner and Participant Eligibility: In other countries, participation is open to recognized, degree-granting institutions of post-secondary education, which may include established, internationally recognized independent research institutes. Secondary foreign partners may include relevant governmental and non-governmental organizations, as well as non-profit service and professional organizations. Participants representing the foreign institutions must be teachers, administrators, or student teaching or research assistants who are working under the supervision of a faculty participant or project director on the achievement of project objectives. Participants must be citizens, nationals, or permanent residents of the country of the foreign partner and must be qualified to hold a valid passport and a U.S. J-1 visa.

Country Eligibility: To increase the chances that competitive proposals can be funded, the number of eligible countries and locations is limited. However, country eligibility is expected to rotate within most of the following seven world regions according to a three-year cycle as outlined below. Countries may be added to the countries listed for FY2001 and FY2002; countries listed as anticipated for eligibility are expected to be eligible in the year(s) for which they are listed. Separate Requests for Proposals will be issued in the spring of 2000 for FY2001 and in the spring of 2001 for FY2002.

(1) **Sub-Saharan Africa:** Proposals are encouraged that will facilitate the development of programs in African educational institutions in collaboration with the private sector to encourage economic development, with the public sector to increase the effectiveness of democratic institutions, or with non-government institutions to improve the quality of community life.

Eligible For FY2000: Botswana, Kenya, Malawi, Nigeria, and Zambia; in addition, trilateral configurations involving a college or university in the United States and a counterpart institution in South Africa with an institution in any other country of sub-Saharan Africa are also eligible. These proposals should clearly demonstrate understanding of both African institutions and provide benefits to all three institutional partners.

Anticipated Eligibility for FY2001: Cote D'Ivoire, Senegal, and South Africa. Subjects to be determined.

Anticipated Eligibility for FY2002: Mozambique, Namibia, Nigeria,

Tanzania, Uganda, and Zimbabwe. Subjects to be determined.

(2) **Western Hemisphere:** Proposals are especially encouraged which strengthen judicial reform, economic reform, or educational reform, or which address current issues in communications or the social or environmental sciences.

Eligible For FY2000: Bolivia, Colombia, Dominican Republic, Ecuador, Haiti, Panama, Peru, Venezuela.

Anticipated Eligibility for FY2001: Argentina, Barbados, Brazil, Chile, Jamaica, Paraguay, Trinidad and Tobago, Uruguay. Subjects to be determined.

Anticipated Eligibility for FY2002: Costa Rica, El Salvador, Mexico, Guatemala, Honduras, Nicaragua, and trilateral projects including both Canada and Mexico. Subjects to be determined.

(3) **East Asia and the Pacific:** Proposals for projects that will promote democracy, strengthen civil society, or help to create more transparent, market-oriented economies are encouraged.

Eligible for FY2000: Cambodia, China, Indonesia, Laos, and Vietnam.

Anticipated Eligibility for FY2001: Indonesia, Malaysia, Philippines, and Thailand. Subjects to be determined.

Anticipated Eligibility for FY2002: China, Korea, Mongolia, and Taiwan. Subjects to be determined.

(4) **Europe:** Proposals are encouraged that will equip universities in central and Eastern Europe to assist with the transitions in the region to more market-oriented economies, to more democratic political life, and to more responsible and accountable administration in the public sector.

Eligible for FY2000: Hungary, Former Yugoslav Republic of Macedonia, Poland, Romania, and Slovakia.

Anticipated Eligibility for FY2001: Albania, Bosnia and Herzegovina, Croatia, Slovenia, and Turkey. Subjects to be determined.

Anticipated Eligibility for FY2002: Bulgaria, Czech Republic, Estonia, Latvia, and Lithuania. Subjects to be determined.

(5) **New Independent States (former Soviet Union):** No eligibility anticipated for the College and University Affiliations Program in FY2000, FY2001, or FY2002. Institutions interested in partnerships with institutions of higher education in countries of the New Independent States of the former Soviet Union should consult a separate request for proposals that will be announced by the Office of Academic Programs in the summer of 1999 for the N.I.S. College and University Partnerships Program, which

focuses specifically on the N.I.S. For information about this program, contact the Office of Academic Programs; Advising, Teaching, and Specialized Programs Division (NISCUPP), (E/ASU), Room 349, U.S. Information Agency, 301 4th Street, S.W., Washington, D.C. 20547, phone: (202) 619-5289, fax: (202) 401-1433.

(6) North Africa and the Middle East: Projects are encouraged which strengthen civil society, or which develop a more effective and more transparent public sector.

Eligible for FY2000: Israel, Jordan, Lebanon, and Oman.

Anticipated Eligibility for FY2001: Israel, Jordan, and Morocco. Subjects to be determined.

Anticipated Eligibility for FY2002: Bahrain, Lebanon, and Tunisia. Subjects to be determined.

(7) South Asia: Proposals for projects that will help to develop good governance and strengthen educational and economic institutions in the region are encouraged.

Eligible for FY2000: India, Pakistan, and Bangladesh.

Anticipated Eligibility for FY2001: India, Nepal, and Sri Lanka. Subjects to be determined.

Anticipated Eligibility for FY2002: Countries and subjects to be determined.

Ineligibility: A proposal may be deemed technically ineligible if:

(1) it does not fully adhere to the guidelines established herein and in the Solicitation Package;

(2) It is not received by the deadline;

(3) It is not submitted by the U.S. partner;

(4) One of the partner institutions is ineligible;

(5) The foreign country or geographic location is ineligible;

(6) It involves a request to fund exchanges between the United States and more than one country, with the exception of the trilateral partnerships between the United States, South Africa, and two sub-Saharan African institutions as specified previously (see the previous section on eligible countries/locations for details);

(7) The amount requested from the Bureau exceeds \$150,000;

(8) The amount requested from the Bureau includes funding for salaries or honoraria for program participants in compensation for teaching or other program activities;

(9) The amount requested from the Bureau includes funding for stipends of student participants;

(10) The amount requested from the Bureau includes funding for the travel or per diem costs of student participants

with the exception of those foreign students and U.S. graduate student teaching assistants who are working under the direct supervision of a faculty member on the achievement of project objectives;

(11) The proposal is for assistance to be directed from one institution to another in one direction only.

Review Process

The Bureau will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package.

All eligible proposals will be forwarded to independent reviewers and to Bureau and U.S. Embassy officers for advisory review.

The independent reviewers, who will be professional, scholarly, or educational experts with appropriate regional and thematic knowledge, will provide recommendations and assessments for consideration by The Bureau. The Bureau will consider for funding only those proposals which are recommended for further consideration by the independent reviewers.

Proposals will also be reviewed by Bureau officers as well as by other State Department officers in Washington, D.C. and overseas. Proposals may also be reviewed by the Office of the Legal Advisor or by other officers of the U.S. Department of State. Funding decisions will be made at the discretion of the Assistant Secretary of State for Educational and Cultural Affairs. Final technical authority for assistance awards (grants or cooperative agreements) will reside with a contracts officer with competency for Bureau programs.

Review Criteria

Independent reviewers and State Department officers in Washington, D.C., and overseas will use the criteria below to reach funding recommendations and decisions. Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank-ordered or weighted.

(1) **Quality and Clarity of Program Objectives:** Proposed programs should outline clearly formulated objectives for each participating institution that will also contribute to freedom and democracy through a deepened mutual understanding of fundamental issues and practical applications in the themes eligible for consideration in this competition.

(2) **Creativity and Feasibility of Program Plan:** Implementation plans for

proposed programs should demonstrate the feasibility of achieving program objectives during a three-year period by utilizing and reinforcing exchange mechanisms realistically and with creativity.

(3) **Impact of Program Objectives:** Proposal objectives should have sustainable consequences for the participating institutions and the societies and communities which these institutions serve.

(4) **Cost-effectiveness:** Administrative costs should be reasonable and appropriate with cost-sharing provided by all participating institutions within the context of their respective capacities and as a reflection of their commitment to cooperation with one another in pursuing project objectives.

(5) **Project Evaluation:** Proposals should include a plan and methodology for evaluating the project's degree of success in meeting program objectives. The plan should include an updated assessment of the current status of each department at the time of program inception; on-going formative evaluation to allow for prompt corrective action; and summative evaluation of the degree of achievement of project objectives together with recommendations for further activities and projects to build upon project achievements.

(6) **Institutional Commitment to Cooperation:** Proposals should demonstrate significant understanding at each institution of its own needs and capacities and of the needs and capacities of its proposed partner(s), together with a strong commitment, during and after the period of grant activity, to cooperate with one another in the mutual pursuit of institutional objectives.

(7) **Support of Diversity:** Proposals should demonstrate substantive support of the Bureau's policy on diversity by outlining relevant aspects of the institutional profile of each participating institution together with the relevancy of issues of diversity to program objectives and implementation.

The terms and conditions published in this RFP are binding and may not be modified by any USIA or State Department representative. Explanatory information provided by the USIA or the Department of State that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will

be subject to periodic reporting and evaluation requirements.

Notification

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures.

Dated: May 10, 1999.

Judith S. Siegel,

Deputy Associate Director for Educational and Cultural Affairs.

[FR Doc. 99-12453 Filed 5-17-99; 8:45 am]

BILLING CODE 8230-01-M

Corrections

Federal Register

Vol. 64, No. 95

Tuesday, May 18, 1999

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

CENTRAL INTELLIGENCE AGENCY

32 CFR Part 1903

Security Protective Service

Correction

In rule document 98-22354, beginning on page 44785 in the issue of Friday, August 21, 1998, make the following correction:

§ 1903.4 [Corrected]

On page 44786, in the third column, in § 1903.4(a)(3)(ii), in the first line, the

paragraph designation "(iii)" should read "(ii)".

[FR Doc. C8-22354 Filed 5-17-99; 8:45 am]

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of As-Built Exhibit A, F, and G and Soliciting Comments, Motions to Intervene, and Protests

Correction

In notice document 99-11765, beginning on page 25316 in the issue of Tuesday, May 11, 1999, make the following correction:

On page 25316, in the second column, in paragraph b. *Project No.*; "5876-038" should read "5867-038".

[FR Doc. C9-11765 Filed 5-17-99; 8:45 am]

BILLING CODE 1505-01-D

NUCLEAR REGULATORY COMMISSION

10 CFR Part 9

RIN 3150-AB94

Government in the Sunshine Act Regulations

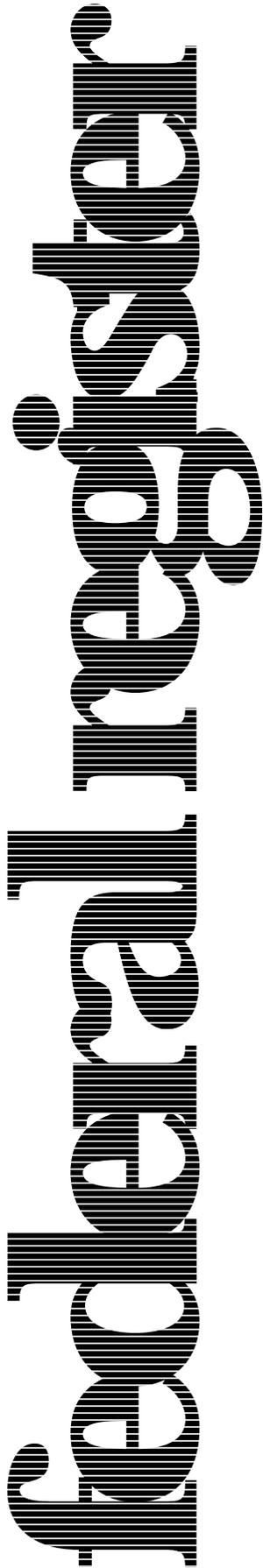
Correction

In rule document 99-11669 beginning on page 24936 in the issue of Monday, May 10, 1999, make the following correction:

On page 24936, in the third column, under **DATES**, in the last line "June 1, 1999" should read "July 1, 1999".

[FR Doc. C9-11669 Filed 5-17-99; 8:45 am]

BILLING CODE 1505-01-D



Tuesday
May 18, 1999

Part II

**Advisory Council on
Historic Preservation**

**36 CFR Part 800
Protection of Historic Properties;
Recommended Approach for Consultation
on Recovery of Significant Information
From Archaeological Sites; Final Rule
and Notice**

ADVISORY COUNCIL ON HISTORIC PRESERVATION

36 CFR Part 800

RIN 3010-AA04

Protection of Historic Properties

AGENCY: Advisory Council on Historic Preservation.

ACTION: Final rule; revision of current regulations.

SUMMARY: The Advisory Council on Historic Preservation is publishing its final rule, replacing the previous regulations in order to implement the 1992 amendments to the National Historic Preservation Act (NHPA) and to improve and streamline the regulations in accordance with the Administration's reinventing government initiatives and public comment. The final rule modifies the process by which Federal agencies consider the effects of their undertakings on historic properties and provide the Council with a reasonable opportunity to comment with regard to such undertakings, as required by section 106 of the NHPA. The Council has sought to better balance the interests and concerns of various users of the Section 106 process, including Federal agencies, State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officer (THPOs), Native Americans and Native Hawaiians, industry and the public. After engaging in extensive consultation through more than four years, the Council has developed this final rule.

DATES: This final rule is effective June 17, 1999.

FOR FURTHER INFORMATION CONTACT: If you have questions about the regulations, please call Frances Gilmore or Paulette Washington at the regulations hotline (202) 606-8508, or e-mail us at regs@achp.gov. When calling or sending e-mail, please state your name, affiliation and nature of your question, so your call or e-mail can then be routed to the correct staff person. Information materials about the new regulations will be posted on our web site (<http://www.achp.gov>) as they are developed.

SUPPLEMENTARY INFORMATION: The information that follows has been divided into eight sections. The first one provides background information introducing the agency and summarizing the history of the rulemaking process. The second section provides a general summary of the comments received in response to the September 1996 notice of proposed rulemaking. The third section

summarizes consultations that took place with Native Americans. Such summary is included in the preamble of these regulations to reflect the fact that regulations incorporate the 1992 amendments to the NHPA which had a large impact on the role of Native Americans on the section 106 process.

The September 1996 notice of proposed rulemaking highlighted six issues on which the Council particularly wanted to receive comments. The fourth section summarizes those comments, and generally reflects the Council reaction to them. The fifth section relates, section by section, the Council's response in these new regulations to the comments received. The sixth section highlights the major changes to the section 106 process that these new regulations implement. The seventh section provides a description of the meaning and intent behind specific sections of the new regulations. Finally, the eighth section provides the impact analysis section, which addresses various legal requirements, including the Regulatory Flexibility Act, the Paperwork Reduction Act, the National Environmental Policy Act, the Unfunded Mandates Act, the Congressional Review Act and various relevant Executive Orders.

I. Background

The Advisory Council on Historic Preservation (Council) is the major policy advisor to the Government in the field of historic preservation. Twenty members make up the Council. The President appoints four members of the general public, one Native American or Native Hawaiian, four historic preservation experts, and one governor and one mayor. The Secretary of the Interior and the Secretary of Agriculture, four other Federal agency heads designated by the President, the Architect of the Capitol, the chairman of the National Trust for Historic Preservation and the president of the National Conference of State Historic Preservation Officers complete the membership. The diverse make-up of the Council provided a broad base of experience and viewpoints from which the Council drew in developing these regulations.

These sections set forth the revised section 106 process. Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470f (NHPA), requires Federal agencies to take into account the effect of their undertakings on properties included in or eligible for inclusion in the National Register of Historic Places and to afford the Council a reasonable opportunity to comment on such undertakings.

In October, 1992, Pub. L. 102-575 amended the NHPA and affected the way section 106 review is carried out. The Council thereafter began its efforts to amend its regulations accordingly. Additionally, as part of the Administration's National Performance Review and overall streamlining efforts, the Council undertook a review of its regulatory process to identify potential changes that could improve the operation of the section 106 process and conform it to the principles of the Administration. The Council commenced an information-gathering effort to assess the existing section 106 process and to identify desirable changes.

As a part of these efforts, the Council sent a questionnaire to 1,200 users of the Section 106 process, including Federal agencies, State Historic Preservation Officers (SHPOs), State and local governments, applicants for Federal assistance, Indian tribes, preservation groups, contractors involved in the process, and members of the public. The questionnaires sought opinions on the existing regulatory process and ideas for enhancing the process. The Council received over 400 responses. After analyzing the responses and holding several meetings with Federal Preservation Officers and SHPOs, the Council staff presented its preliminary findings to a special Task Force comprised of Council members representing the Department of Transportation, the National Conference of State Historic Preservation Officers, the National Trust of Historic Preservation, the Council's Native American representative, an expert member and the chairman. The Council member representing the Department of the Interior was later added to the Task Force. This diverse, special Council member Task Force worked closely with the Council staff, reviewing comments and numerous drafts of the regulations.

The Task Force adopted the following principles and attempted to craft regulations to reflect them: (1) Federal agencies and SHPOs should be given greater authority to conclude Section 106 review; (2) the Council should spend more time monitoring program trends and overall performance of Federal agencies and SHPOs, and less time reviewing individual cases or participating in case-specific consultation; (3) Section 106 review requirements should be integrated with environmental reviews required by other statutes; (4) Section 106 enforcement efforts should be increased, and specific remedies should be provided for failure to comply; and (5) the public should be granted expanded

opportunities for involvement in the Section 106 process. These principles have guided the regulatory reform effort.

The Council drafted proposed regulations, seeking to meet the stated findings and objectives adopted by the Task Force. On October 3, 1994, the Council published those draft proposed regulations on the **Federal Register** and sought public comment, on a notice of proposed rulemaking (59 FR 50396). The notice provided for a 60 day public comment period, and a 30 day extension of that period for Indian tribes who requested it. The Council received approximately 370 comments on the October 1994 proposal. Generally, commenters supported the overall goals and direction adopted by the Task Force, but found that the proposed regulations failed to implement the stated goals. Particularly, many commenters disagreed with the role of the Council as arbiter of disputes over application of the regulations, the public appeals process, and provisions dealing with enforcement.

At a Council membership meeting in February, 1995, the Council decided to continue its dialogue with major user groups of the section 106 process in an effort to resolve these concerns. The Council membership also reaffirmed the objective of reducing regulatory burdens on Federal agencies and SHPOs and focusing the review process on important historic preservation issues. The Council solicited the views of users of the Section 106 process once again by convening separate focus groups with local governments, industry representatives, Native Americans and Federal agency officials in early 1995. As a result of these meetings, and after considering the views of commenters, the Council drafted a substantially revised proposal and circulated the draft informally in July, 1995 to those who had commented on the October, 1994, notice of proposed rulemaking. The Council received approximately 80 comments on the informally distributed draft. Generally, the commenters found the July, 1995, draft to be an improvement on the October, 1994, proposal. Again, however, Federal agencies noted that the Council did not go far enough in removing itself from routine cases and in bringing finality to the process. Federal agencies also remained concerned that the public participation provisions were too open-ended and inadequately defined the roles and rights of participants in the process. Federal agencies also considered the National Environmental Policy Act (NEPA) integration section to be a step forward, but submitted that its substitution provisions should be

extended to environmental assessments as well as environmental impact statements and, overall, could provide better integration of NHPA and NEPA. In contrast, the majority of SHPOs did not want the Council to remove itself further from the Section 106 process and did not want the NEPA integration section to be extended to environmental assessments. The National Conference of State Historic Preservation Officers, as well as many of its member SHPOs, supported the public participation process as set forth in the July, 1995, draft, but sought clarification on the roles and responsibilities of Federal agencies under section 106. Although industry commenters deemed the July, 1995, draft a vast improvement over the 1994 proposal, they remained concerned with the appeals procedures and found the process too burdensome. Industry also remained concerned about the public participation provisions.

In accordance with the general approach described above, after reviewing the comments on the October, 1994, proposal, and in response to agency downsizing and restructuring, the Council substantially changed its proposal. The new proposed regulations were published on the **Federal Register** on a second notice of proposed rulemaking on September 13, 1996 (61 FR 48580). Again, the notice provided for a 60 day public comment period, and a 30 day extension of that period for Indian tribes who requested it. The notice highlighted six specific issues to focus commenters' review on what the Council believed to be the most critical issues of concern. The six issues were: public participation, local government involvement, Council review of agency findings, time frames, and alternate procedures. The Council received 221 comments. Most commenters focused on the six issues listed above. A summary of the comment received in response to the September, 1996, notice is presented below, under its own section (See Section II of the preamble, below).

On November 12, 1996, reauthorization legislation for the Council was signed into law. It directed the Council, within 18 months, to submit a report to Congress containing an analysis of alternatives for modifying the regulatory process under Section 106 and section 110(f) of the NHPA, and "alternatives for future promulgation and oversight of regulations for implementation of Section 106 of the (NHPA)." The report was submitted to Congress in May, 1998. In summary, the report concluded that the basic implementation of the Section 106 process was sound, though it certainly

merited continuing improvement. It also stated that some improvements sought in the rulemaking process should result in more thoughtful and efficient decisionmaking and better protection of significant historic properties. It noted that only a small number of the thousands of projects and programs considered under the Section 106 process each year were problematic or controversial, and that those should continue to receive an appropriate level of attention and public debate even while the Council worked to improve the planning and review process to forestall or minimize potential disputes of this nature that could arise in the future. The Council also reaffirmed its commitment to ensuring that it would continue to develop program and operational enhancements that promote the effectiveness, consistency, and coordination of other public policies and programs with the purposes Congress articulated in the NHPA.

Through the process of considering public comments, the Council formulated a draft regulation on June 5, 1997. During August and September of 1997, the Council conducted consultations with Indian tribes regarding the June, 1997, draft regulations. These special consultations were held to respond to tribal concerns about prior insufficient consultation, to meet Administration directives regarding government-to-government consultation with Indian tribes and to recognize the special role given Indian tribes in the 1991 NHPA amendments. A summary of these consultations is provided under Section II, below.

After further, careful consideration of all public comments and the results of its tribal consultations, the Council revised the June, 1997, draft regulations. On October 24, 1997, the Council membership approved this draft of the regulations. On November 20, 1997, the Council submitted its draft regulations to the OMB Office of Information and Regulatory Affairs for their required review. This review involved numerous interagency meetings over the course of 15 months and resulted in certain changes in the October, 1997, draft to meet agency concerns.

At its business meeting on February 12, 1999, the Council formally adopted the draft of the regulations resulting from the OMB review process. Previously, the Council Chairman and the Regulations Task Force, in response to concerns raised by certain commenters, carefully considered whether the final regulation should be published once more for public comment. They determined that the changes made in response to public

comment and interagency review did not make substantial changes in the section 106 process as presented for public comment in September, 1996, and were rather the Council's reasonable response to and incorporation of suggested refinements that emerged from the public review process.

After the Council's Regulations Task Force adopted final technical and editorial changes to the regulations, and the preamble was finalized, this preamble and regulation were submitted to the OMB for final review, and then to the **Federal Register** for publication.

II. General Summary of Comments From the September, 1996, Notice of Proposed Rulemaking

Following is a summary of the major issues raised in the comments received in response to the notice of proposed rulemaking in September 1996. These comments led to the drafting of the proposed regulations that were then handed to the OMB Office of Information and Regulatory Affairs for their required review. Note that the terms "most" or "a majority" or other like phrases on the particular issue discussed. Please refer to Section V of this preamble for a discussion on the Council's response to the comments received.

A. Federal Agencies (35 Comments, Including Those From Field Offices and Regions)

General

A majority of agencies found that the regulations proposed on the September 1996 notice of proposed rulemaking ("September 1996 draft") either streamlined the existing regulatory process or were an improvement over the proposal on the October 1994 notice of proposed rulemaking ("October 1995 draft"). Nevertheless, almost all suggested further changes.

Council Role

Most agencies were pleased with the general approach of deferring to Federal agency-SHPO decision making. Some felt that the Council did not go far enough in removing itself from the process. Others did not see the value in filing Memoranda of Agreement (MOAs) with the Council. One agency expressed its concern that the deference to agency-SHPO decision making would create inconsistencies and delays and would leave SHPOs subject to political pressure.

In addressing the Council's role in the 106 process, some agencies recognized and supported the Council's right to

intervene in a case on its own initiative, while others opposed this provision. Specifically, some agencies expressed problems with the Council's right to intervene when projects involve tribal lands and whenever the SHPO fails to respond to an agency. On the Council's role in agencies' alternate procedures, most agencies opined that the Council approval should not be required for such procedures, although one agency found this role for the Council to be appropriate. Related to the Council's role, a number of agencies objected to the appeals process as set forth in the provision relating to the Council review of section 106 compliance, finding that it was too open-ended and inappropriately allowed the Council to enter the process after decisions had been made. Other agencies liked that appeals process, while one agency found it too restrictive. A few agencies viewed the Council as exceeding its authority in general in the regulations.

Public Involvement

The issue of public involvement was one of concern to agencies. Most agencies found that there were too many opportunities for the public to become involved. Specifically, agencies were concerned that the public could protest late in the process. Some agencies believed that existing agency procedures could better address public involvement, that guidelines on the goal of public involvement would be more appropriate than regulations, and that public involvement requirements should be lessened for minor projects. Agencies also expressed concern about the description of various participants in the process and their corresponding rights and responsibilities. Several agencies also took issue with the requirement that agencies consult with traditional cultural authorities because of the difficulty in identifying them.

NEPA Coordination

Several agencies found the goal of NEPA coordination beneficial, but did not find that the NEPA coordination section achieved its goal. Agencies found the section inconsistent with NEPA, particularly where agencies prepare an Environmental Assessment (EA), because of the public involvement and documentation requirements in the Council's regulations. Some agencies found the section helpful.

Time Frames

The issue of time frames for the different steps of the 106 process was also raised by agencies, with some suggesting that additional time frames were needed to make the process more

efficient. Other agencies found the time frames appropriate as proposed. One agency objected to the suspension of the process where the Council or SHPO determines there is inadequate documentation.

Other Issues

Agencies favorably noted the new provisions on phased compliance and consideration of the magnitude of the undertaking and nature of property and effects. Agencies also liked the section on alternative means of satisfying 106, but some noted that the same result could be achieved through Programmatic Agreements (PAs). Agencies also expressed concern over the requirements that agency heads document decisions involving terminations, finding it inappropriate to elevate such decisions.

B. SHPOs (45 Comments, Including Those From Deputies and Staff)

General

Overall, the majority of SHPOs were satisfied with the direction of the proposed regulations or believed that the Council had made substantial progress in achieving streamlined regulations.

Council Role

An overwhelming concern of SHPOs was the proposal that the Secretary of the Interior decide disputes over consistency of agency procedures with section 106. Almost all SHPOs found that the Council should determine consistency. The majority of the SHPOs found that Council's role and criteria for involvement appropriate, although many noted that the regulations should clarify that the SHPO could directly seek the Council's involvement in a case. Some noted that the Council should be required to participate when asked by a SHPO.

Public Involvement

Most SHPOs supported the public participation provision, although some were still concerned that the public would be precluded from the process and would not have a real opportunity to provide input. The delineation of the roles and rights of participants was also viewed as somewhat confusing, according to several SHPOs. Some SHPOs found that the proposal could preclude the public from meaningful participation in the process. Several SHPOs also noted that Federal agencies should be required to consult with SHPOs when identifying interested parties. With respect to the public's right to appeal agency decisions under the provision regarding Council review

of Section 106 compliance, a number of SHPOs commented that appeals should not be restricted to members of the public who participated in the process. Further, several SHPOs found that the public appeal section set too high of a standard on the public in making a case for an appeal.

Alternative Procedures

With regard to program alternatives, SHPOs were supportive of the proposal, but many suggested that the National Conference of State Historic Preservation Officers (NCSHPO), individual SHPOs, and the public participate in the development of standard treatments, alternative agency procedures and categorical exemptions. SHPOs also overwhelmingly expressed the opinion that NCSHPO be given the right to terminate nationwide Programmatic Agreements. A number of SHPOs commented that they found the bridge replacement standard treatment as proposed in Section 800.5 of the September 1996 version to be inappropriate.

Time Frames

The most common concern of almost all SHPOs was the 15-day deadline for a finding of no historic properties affected. SHPOs believed this was an unreasonable short turn-around time for them to make a proper determination. With the exception of the 15-day deadline, most SHPOs found the time frames appropriate. Some noted that the different time periods were confusing and suggested adding time frames wherever the regulations referred to the phrase "timely manner."

C. Industry (24 Comments)

General

The majority of industry commenters stated that the September 1996 draft was substantially improved over either the existing regulations or the October 1994 draft. However, all commenters offered suggestions for further amending the regulations. Several other commenters, primarily associated with the mining industry, noted that while the September 1996 draft was an improvement, changes were still necessary to make the proposal acceptable. The question of the Council overstepping its authority was the primary concern of industry.

Council Role

The mining industry and several other commenters were concerned that the Council had overstepped its statutory mandate in the existing regulations and those proposed. They found that the regulations allowed the Council to

"second guess" Federal agency decisions, particularly in the appeals section regarding Council review of section 106 compliance. Some commenters recognized that the proposed regulations provided a more limited role for the Council and, therefore, supported this change. Most industry commenters found that the Federal agency, not the Council, should decide whether agency procedure were consistent with section 106.

Public Involvement

The role of participants in the process, particularly the public and applicants was a major issue of concern for the industry. Generally, many commenters found the roles poorly defined and confusing. Several commenters suggested the regulations delineate and limit participants entitled to partly status and those entitled to notice status. Many commenters liked the enhanced role of applicants, but some suggested that applicants deserved equal status with principal parties. On the role of the public in appeals of agency decisions (in the provision regarding Council review of section 106 compliance), some commenters noted approvingly that appeals were limited to parties who had participated in the process. However, most commenters on the issue wanted the appeals process further limited to parties that met legal standing requirements. Industry commenters, primarily from the mining industry, viewed public participation as too open-ended and lacking finality.

NEPA Coordination

Industry commenters approved of the concept of NEPA coordination, but found that the proposed regulations would not reduce burdens because the NEPA documents still have to meet the Council's criteria.

Alternative Procedures

Almost all industry commenters approved of the concept of standard treatments, categorical exemptions, PAs, and alternate procedures.

Time Frames

On the issue of time frames, commenters suggested inserting deadlines at each step in the process, including consultation, and found references to the words "timely" or "before" too vague and unworkable.

Other Issues

Several industry commenters viewed the requirement to consult with traditional cultural authorities as burdensome. Generally, industry found that the regulations provided too much

"special treatment" for Native Americans. Industry commenters were also interested in having the regulations address the question of agency jurisdiction on non-Federal lands.

D. Indian Tribes (28 Comments)

General

Tribes overall were dissatisfied with the direction of the regulations.

Council Role

Tribes were troubled by the Council's removal from routine case review and found that the proposed regulations did not provide a balanced process. However, several tribes stated that the Council should participate on projects on tribal lands only if requested by the tribe.

Public Involvement

Tribes found the public appeals provision in the section regarding Council review of section 106 compliance to be too restrictive. They also suggested that the regulations clarify that Federal agencies must solicit the views of Indian tribes as members of the public, as well as consult on a government-to-government basis.

NEPA Coordination

Tribes viewed the NEPA coordination provision as troublesome because sensitive tribal information gathered in fulfilling the Council's criteria would be included in an Environmental Impact Statement (EIS) and thus available for public distribution.

Alternative Procedures

Tribes wanted to be included in the development of standard treatments, categorical exemptions, PAs and alternate agency procedures. Tribes were most concerned about the standard treatment for archaeology as proposed in § 800.5 of the September 1996 version, finding it discouraged consideration of the broader values of a site.

Other Issues

Tribes were most concerned with the identification and evaluation of historic properties, including properties to which they attach religious and cultural significance. They were concerned that Federal agencies' identification efforts would be incomplete and that agencies would make "no historic properties affected" determinations without prior consultation with the tribes. They also found that the standard treatment provision covering data recovery for archaeological sites as proposed in § 800.5 of the September 1996 version, encouraged evaluation of sites only for

criterion D of the National Register and discouraged consideration of the broader range of values of the site. The relationship between tribal and SHPO responsibilities was also of concern to tribes. When undertakings were on tribal lands, tribes did not want SHPO involvement. When undertakings were on non-tribal lands, but affected properties to which they attach religious and cultural significance or other historic properties of tribal concern, then tribes wanted equal status with SHPOs and NCSHPO in the process. Tribes also suggested that the regulations require determinations of eligibility from the Keeper where tribes disputed an agency decision on eligibility.

E. Local Governments (11 Comments)

General

Local governments were supportive of the concept of allowing agencies and SHPOs to conclude the 106 process without Council review.

Council Role

Local government commenters overall found the proposed role of the Council appropriate, but expressed concern about the loss of the Council as a balancing force in the process.

Public Involvement

The public participation requirements were viewed as redundant with NEPA. The National Association for County Community and Economic Development opposed the requirement to consult with tribes on non-tribal lands.

Alternative Procedures

Local governments supported the use of standard treatments, but wanted more flexible application of the Secretary's Standards for Rehabilitation. Some were concerned about the standard treatment for bridge replacements as proposed in § 800.5 of the September 1996 version.

F. Preservation Organizations (21 Comments)

General

Preservation organizations were most concerned about the diminished role of the Council as set forth in the general framework of the proposed regulations. They also viewed the public participation provisions as preventing meaningful public involvement.

Council Role

Preservation organizations opposed the decreased role of the Council in the 106 process, finding that it displaced the check and balance system of the process in place at the time. They also

considered the proposal as placing too many constraints on the Council's ability to review agency findings. The Council's withdrawal from commenting on standard treatments under the section on the assessment of adverse effects was also of great concern to preservationists. On the issue of the Council's role in determining consistency of agency procedures, the few groups that commented found that the Council should make the determination.

Public Involvement

The public's role in the process as proposed was of great concern to preservation organizations. They found the public participation provisions confusing, complicated, and circumscribed, leaving the public with no meaningful role in the 106 process. The proposal, according to preservation organizations, would increase litigation, last minute appeals and Council foreclosures.

NEPA Coordination

Preservation organizations supported the concept of compliance coordination with NEPA, but found that the September 1996 draft did not go far enough to protect preservation interests.

Alternative Procedures

Commenters were supportive of the concept of alternative procedures, but wanted provisions to explicitly ensure that the public participate in their development and implementation.

Time Frames

Commenters strongly opposed the 15-day deadline for SHPO review of a "no historic properties affected" finding, as not giving SHPOs adequate time to conduct such review.

Other Issues

Preservation organizations were opposed to the standard treatments as proposed in § 800.5 of the September 1996 draft, finding that the public, tribes and Council would have little or no role in projects involving bridges or archeology. The § 800.5 standard treatment for archeology, according to the commenters, would encourage agencies only to consider criterion D and, thus, to not properly consider other values.

G. General Public (14 Comments)

General

There were no significant trends in the comments from the general public. Individuals raised particular concerns based on their own interests and experience. Several commenters noted

that, overall, the regulations appeared to be too complex. Three commenters expressed concern that the regulations could affect their rights as private landowners.

Council Role

A few commenters found that the removal of the Council from routine cases would create too much pressure and work for SHPOs.

Public Involvement

Several comments found that the proposed public participation provision failed to provide sufficient opportunities for public involvement.

Alternate Procedures

A few commenters expressed concern about the standard treatment for bridge replacements and archaeological sites as proposed in § 800.5 of the September 1996 version.

H. Experts/Consultants (33 Comments)

Council Role

Most commenters found that the proposal did not provide enough opportunities for Council involvement in the process. Commenters expressed concern that the proposal did not set forth an adequate check and balance system, leaving SHPOs subject to political pressure. Several experts suggested that the regulations focus more on substantive outcomes and less on removing the Council from the process.

Public Involvement

Experts and consultants found that the terms and procedures in the proposal were too complicated and vague and would, thus, discourage meaningful public involvement. Commenters found the delineation of participants too confusing. Overall, commenters noted that the proposal provided few opportunities for public participation and gave the Federal agencies too much control over public involvement.

NEPA Coordination

Experts and consultants found the NEPA coordination section to be inadequate, since they believed it did not go far enough in allowing use of NEPA for 106 purposes.

Alternative Procedures

Experts and consultants expressed concern about the standard treatment for archeology as proposed in § 800.5 of the September 1996 version, finding it would encourage sites to be evaluated as significant only for the data they contain. A few commenters found the

proposed bridge replacement standard treatment problematic.

III. Summary of Native American Consultations

As stated before, these regulations seek, among other things, to incorporate the 1992 amendments to the NHPA. Such amendments include important changes that significantly alter the role of Indian tribes in the 106 process. The Council members decided that before submitting a draft proposed regulation to the OMB for the mandatory review, additional input should be sought from Native Americans. The meetings focused on obtaining comments on the June 5, 1997 draft of the revised regulations (See Section I of the preamble, above). Each meeting of the four meetings was two days long. A total of eight days were spent discussing various aspects and concerns with tribal representatives.

The tenor of each meeting varied but all of the meetings proved productive. The attendees in Seattle were few but, as a result, the discussion was detailed. At Leech Lake Reservation, where the land base is shared by both the Forest Service and the Leech Lake Tribe, discussion focused on land jurisdictions and authorities. The meeting in Albuquerque solicited highly constructive suggestion due to the participants' extensive Section 106 experience. The Washington, DC meeting had the greatest number of participants from tribes and legal firms representing tribes.

The format of each meeting was consistent for all four meetings. The Executive Director briefed the group on the administrative structure of the Council, the existing steps of the regulation revision process and the proposed changes. The floor was then opened for discussion and recommendations. Some participants handed in written comments as well. The Native American/Native Hawaiian Council Member, Mr. Raynard Soon, attended the Seattle meeting and had the opportunity to convey his interest and listen to other Native American concerns.

This summary is presented in three sections of primary concerns that were stated at every meeting. The primary issues clearly became the focus points of the discussions as almost every participant reiterated in similar form the same concerns. They are presented in the following manner: (1) General overall comments and observations, (2) comments on sections pertaining to the Section 106 process on tribal lands, and (3) comments pertaining to the section 106 process off tribal lands.

General Comments

General observations in all of the meetings included the concern that the Council did not give the Native Americans adequate time to consult with them on the proposed regulations. The time constraint of potential adoption of the revised regulations at the October, 1997, Council meeting, before submission to OMB for review, was consistently questioned by many participants. The overriding sentiment was that the time frame was not adequate. Many tribal representatives explained that they had to take the information back to their Tribal Councils to receive directions and comments.

The proposed June 5, 1997 draft of the regulations was perceived by tribes as being heavily weighted toward the SHPO interest. Requests were made to take the state-oriented bias out of the draft. At every meeting, suggestions were made to change the "SHPO" citation to "SHPO/THPO" (Tribal Historic Preservation Office) or simply HPO (Historic Preservation Officer). There was consistency in the recommendation that even if tribes have not assumed SHPO duties, as delegated by the National Park Service (NPS) in accord with section 101(d)(2) of the NHPA, that the tribe or Native Hawaiian Organization should still be consulted if places of religious and cultural significance would be affected by a federal undertaking.

It became apparent that the word "consultation" is interpreted differently by Indians and non-Indians. In general, American Indian participants believed that the word implies a "give-and-take" dialogue, not just listening or recording their concerns. From the tribal perspective, consultation is more closely aligned with the process of negotiation. The tribes described that consultation means working toward a consensus. For non-Indians, consultation has another meaning: if the tribe had been contacted, attended the meetings, and had the opportunity to discuss its views with the agency, then the tribes had been consulted regardless of the outcome. For the majority of the American Indian participants, this kind of exchange did not represent adequate or effective consultation.

Where the proposed regulatory process addressed the requirements of Federal involvement regarding the places of religious and cultural significance to Native Americans, participants were adamant that they be involved in the process of decision making for an acceptable outcome. Requests were repeated to insert clear

procedures within the regulations regarding "adequate consultation." The stated preference of the American Indian participants was a clear definition in the regulations so that all parties in the section 106 process would perform what the tribes saw as adequate consultation.

On-Tribal Lands

The issues consistently raised for tribal lands reflected the underlying issue of a tribal nation's sovereignty. The primary concern was the ability of a SHPO to make or agree to a decision by a federal agency on tribal lands when there was no THPO. Tribal representatives explained why this was a problem for tribal governments and why the regulatory process under the June, 1997, draft regulations that enabled a State to have overriding decision-making authority on tribal lands, questioned their sovereign status. By delegating the authority vested in the Council by the NHPA for commenting on Determinations of No Adverse Effect and Adverse Effect, the proposed regulations effectively shifted the authority from a federal agency (the Council) to a State on tribal lands when there was no THPO. This shift of delegation from Federal to State clearly presented legal jurisdiction issues from the tribes' perspectives. Participants in the meetings maintained that, regardless of whether the tribe had formally assumed SHPO duties, the State did not have the jurisdictional authority to have final oversight for a federal undertaking on tribal lands.

Off-Tribal Lands

There are several issues that were raised in each meeting for those Federal undertakings that would affect religious and culturally significant places located off tribal lands. Much of the time was spent discussing American Indian involvement in the process on ancestral lands, ceded lands, fee lands and other types of land titles. A consensus of tribal representatives maintained that sovereignty, treaty rights, trust responsibility and government-to-government status entitled the tribes to a role in the process that was greater than the other "consulting parties" or general public as defined in the draft proposal.

The discussion surrounding the identification, evaluation determination of effect and potential mitigation proposals for properties to which the tribes attach religious and cultural significance resulted in recommendations that tribes should be involved early in the process and required signatories to a Memorandum

of Agreement, or at least have the ability to concur or object to the part of a project or plan that will affect an area of tribal or Native American interest.

IV. Summary of Comments Received Regarding the Six Issues Specially Raised in the September 1996 Notice of Proposed Rulemaking

On the preamble of the proposed regulations published for public comment on the **Federal Register** on September 1996, the Council presented six issues that it believed, based on comments received, deserved special attention from the commenters. What follows is a discussion of the commenters' response to these six issues and the Council's general reaction to them. For a discussion on the Council's response to comments, please refer to Section V of the preamble.

Finally, please note that these issues are stated in the same language as presented in the published preamble to the September 1996 draft.

1. Public Participation

The goal of the regulatory requirement that Federal agencies inform and involve the public in the section 106 process is to ensure that the public has a reasonable opportunity to provide its views on a project. The Council has attempted to give the public an adequate chance to voice its concerns to Federal decisionmakers while recognizing legitimate concerns about avoiding unnecessary procedural burdens and delays and protecting the privacy of non-governmental parties involved in the section 106 process. How can the regulations be enhanced to provide for meaningful public involvement in a timely and effective fashion?

Summary of comments: Federal agencies were still concerned about the role of the public in the process. Agencies believed that the roles and responsibilities of various participants were unclear. They still found that the public could delay a project by using the 106 process. Most SHPOs supported the public participation provision, although some still found the role of the public as set forth on the September 1996 draft to be unclear. Several SHPOs found the public appeals provision too restrictive. Local governments found the public participation provisions excessive and duplicative of NEPA, noting that the public involvement requirements would discourage local governments from seeking Federal monies for projects. Tribes found the public appeals provisions to be too restrictive. In addition, they wanted the regulations to clarify that agencies must consult with the general populace of tribes as members of the public. The role of the public was a major concern

of the industry. Their comments viewed the public participation provisions as unclear and excessive. They wanted to further limit the public's right to appeal agency decisions. Many specific comments were received from all categories of commenters that were critical of the clarity and timing of public participation provisions.

Council general reaction: The public participation provisions needed a thorough overhaul with the objective of making them clearer, achieving earlier effective public involvement and providing better public access to the Council when it was not involved in a case. The Council thought that the provisions should be redrafted to achieve these goals, while honoring the Council's original policy of encouraging the use of agency public participation procedures, reducing duplication of effort and having clear points of involvement and points of closure for the Section 106 process. The Council believed that the question of public participation could be effectively addressed by careful examination of the provisions, following the preceding principles, rather than adopting some significant departure from the Council's original objectives in this area.

2. Local Governments

Several agencies see an enhanced role for certified local governments in the section 106 process and find that the regulations do not go far enough in providing for their involvement. The definition of "Head of the agency" provides that the head of a local government shall be considered the head of the agency where it has been delegated responsibility for section 106 compliance. How can we better incorporate local governments into the process without confusing the regulations?

Summary of comments: Federal agencies were not concerned with this issue overall, but those that commented found the local government role appropriate as proposed. HUD wanted the regulations to set forth an enhanced role for local governments. Some SHPOs felt that Certified Local Governments (CLGs) should be given recognition in the procedures, although others found the role appropriate as set forth in the proposed regulations. Some SHPOs noted that increased CLG involvement would bring a lack of consistency to the regulations, others noted CLGs may not be equipped to handle compliance. Local governments did not question their role in the process as set forth in the regulations, although they expressed general concern about SHPOs having too much power in the process. Tribes were not concerned about this issue. Industry was for the most part not

concerned about this issue, although those that did comment found the level of local government involvement appropriate as drafted.

Council general reaction: Based on these comments, the Council believed that no major changes should be made in the role of local government. We suggested continuing to work with HUD to determine if there are specific amendments that could be made to advance their interest in enhancing the role of local governments while remaining consistent with overall direction of the regulations and avoiding further complicating the regulations. It is intended to pursue this in the development of local government program alternatives (§ 800.15), which as been reserved for future issuance.

3. Council Involvement

In this proposal, the Council has removed itself from review of no adverse effect determinations and routine Memoranda of Agreement with the intent of deferring to agency-SHPO decisionmaking as a general rule. At the same time, as the Federal agency assigned to review the policies and programs of Federal agencies on historic preservation matters, the Council has retained the right to enter the consultative process on its own motion or when requested by the Agency Official. The regulations set forth in 800.6 several criteria which indicate when an Agency Official must invite the Council to become involved in the consultation. They also set a general standard for when the Council will enter the process without a request. The Council intends on exercising its right to enter the process sparingly. Are the criteria set forth in § 800.6(a)(1)(i) workable? Can the regulations better define when the Council will intervene on its own initiative?

Summary of comments: Federal agencies like the general approach of deference to agency-SHPO decisionmaking, although some found that the Council did not go far enough in removing itself from the process or did not see the value in filing MOAs with the Council. Most agencies recognized the Council's right to intervene in a case on its own initiative, although some opposed this provision. SHPOs were satisfied overall with the Council's role in the process, although many SHPOs noted that they should have the right to go directly to the Council to seek Council intervention in a case. Local governments were concerned that the level of Council involvement may be too low and believed the SHPO would gain too much control under this proposal. Tribes were greatly concerned about the Council's removal from routine case review and found that the September 1996 draft failed to achieve a balance of power in the section 106 process.

Industry suggested the direction of removal of the Council from routine cases, but still found the Council had too much authority in the process to intervene and second-guess agency decisions. Preservation consultants expressed concern over possible abuses by agencies and SHPOs without adequate checks and balances.

Council general reaction: This was a critical point of the regulations and one that raised a lot of concern from a variety of sources. We believed that the basic principle of deferring to Federal agency-SHPO decisions was valid, but that the draft needed to better define when and how the Council would get involved. The Council did not believe in a policy change, but rather a refinement of the published provisions to clarify the Council's role and how parties invoked our involvement, responding to the specific comments. In particular, the involvement of the Council when undertakings affected Indian tribes and their interests needed to be expanded, as did the SHPO's right to directly request Council involvement. Changes made to address this issue had to be closely coordinated with those dealing with Council review of agency findings.

4. Council Review of Agency Findings

Section 800.9 provides for Council review of agency findings where the Council has not participated in the consultative process pursuant to § 800.6. The Council's right to review agency findings is limited to whether the agency followed the appropriate procedures when making an eligibility determination under § 800.4(c)(2), a no historic properties present or affected finding under § 800.4(d), or a no adverse effect finding or resolution by standard treatment under § 800.5(c). The right to review is also limited by the requirement that the request be made prior to the agency approval of the expenditure of funds or the issuance of a license, permit or other approval. The Council has 10 days to decide if the request warrants Council review and 30 days to decide the merits of the case. The Council finds that the above review process strikes a balance between allowing review of procedurally deficient agency decisions and limiting review to situations that could not have been corrected earlier in the process. Some Federal agencies find that the review process in § 800.9 provides the Council too much authority to second guess agency decisions and promotes a lack of finality to the process. How can the regulations accommodate the Council's concerns and those of other Federal agencies?

Summary of comments: Federal Agencies were divided in commenting on the appeals provision in the proposal. Some found that the September 1996 draft provisions were too open-ended and allowed the Council to enter the process after

decisions had been made. Others liked the appeal procedures. SHPOs found the appeals provision satisfactory with respect to the Council's role. Local governments did not express concern over the Council's role in appeals over agency decisions. Tribes found the appeals provision too restrictive in general. Industry still was dissatisfied with the appeals section, finding it would create delays and allow review of agency decisions too late in a project's development. Industry maintained that the Council was overstepping its authority in this section by reviewing agency decisions. Comments from individuals and preservation organizations expressed concern that the appeals provisions were too restrictive and needed to be expanded.

Council general reaction: The Council believed that ready access to the Council was an essential counterbalance to the removal of the Council from routine case involvement. This access must be effective for a broad range of parties in the Section 106 process while maintaining a system that has definite points of closure for agencies and applicants. The September 1996 draft formulation was too restrictive and the regulation should be revised to provide a wider range of parties with more time to bring issues to the Council. However, this process must continue to have effective protections against groundless claims and potential for process abuse.

5. Time Frames

Throughout the regulations, time frames are set for reviews conducted by SHPOs and the Council. Generally, they allow thirty days for responding to agency requests, although some are shorter. These have been established in an effort to balance the need for an expeditious process for Federal agencies and applicants with the recognition of the need for adequate time to evaluate submissions (as well as the limits on resources available in SHPO offices and at the Council to respond within the specified time). Do the time frames achieve this balance or should specific ones be increased or decreased?

Summary of comments: All groups of commenters noted that vague references to "timely" or "before" should be replaced with specific time frames. Federal agencies suggested adding time frames for each step in the process. SHPOs overwhelmingly expressed concern about the 15-day deadline for a "no historic properties affected" determination, finding the period of time too short. SHPOs also noted that the different time periods listed in the September 1996 draft would foster confusion. Local governments stated that the overall process was too time consuming. Tribes did not express

concern about the issue. Industry is most concerned about time frames, finding the different time frames too confusing. They find the 45 days for Council comment, 30 days for review of an EA and 15 days for SHPO review of a "no historic properties affected" finding to be too long. Overall, they found the process could be tightened up and made more predictable by adding more time frames. Preservation organizations expressed concern about time frames being too short, particularly the 15-day provision.

Council general reaction: The concern for the 15-day limit on SHPO responses was valid and that to fail to address it would place an unreasonable burden on SHPOs. It was decided that the entire assemblage of specified time frames should be carefully examined for clarity, specificity and consistency. The 15-day limit in question was changed to 30 days, which is the general standard for review in the entire regulation.

6. Alternate Procedures

The proposed regulations allow Federal agencies to substitute their own procedures for those contained in subpart B. Section 110(a)(2)(E) of the Act requires that procedures implementing section 106, including these substitute procedures, be consistent with the Council's regulations. The proposed regulations charge the Secretary [of the Interior] with making final determinations on consistency. This is based on the Secretary's primary responsibility for implementing section 110. Alternatively, the Council, as the agency charged to section 211 of the Act with issuing the regulations to guide the implementation of section 106, could make such a determination. A third option is allowing the Federal agency itself to make a determination of consistency. Is the proposed approach the best solution?

Summary of comments: Almost all Federal agencies found that they should make the determination on consistency of agency procedures with section 106. All SHPOs found that the Council should make the determination as to consistency and viewed the Secretary of Interior's role as final arbiter to be inappropriate. Local governments did not express concern on this issue. Tribes view the Council as a protector of their interests and view the Council as a check against agency decisionmaking. Industry overwhelmingly finds that the Federal agency should determine consistency of agency procedures. Preservation organizations were generally silent on this point.

Council general reaction: The Council believed that the proper entity to determine consistency was the Council membership and changed the regulation accordingly. Among other things, the Council has the statutory responsibility

to oversee the section 106 process, the internal experience and expertise to make such evaluations, and the diversity of membership to ensure that a balanced perspective is brought to final determinations regarding consistency.

V. Response to Comments

This section of the preamble relates, section by section, how the Council responded to comments from the public regarding these regulations.

Section 800.1

There were few comments on § 800.1. One comment stated that the goal of consultation was inappropriately described in the September 1996 notice of proposed rulemaking draft ("September 1996 draft") as avoiding or minimizing adverse effect on historic properties. The comment found this language to be inconsistent with the procedural nature of section 106 of the NHPA. The Council agreed and therefore modified the § 800.1(a) of the regulation in response to this comment by adding that the goal is to "seek ways to avoid, minimize or mitigate any adverse effects on historic properties."

Another comment expressed concern about the reference in the September 1996 draft to other guidelines, policies and procedures issued by other agencies. The Council and the OMB were acutely aware of such concerns and carefully crafted the language in § 800.1(b) to make it clear that such references in these regulations do not implement those policies, procedures or guidelines as regulations.

Section 800.1(c) of the September 1996 draft explained the different methods of complying with these regulations. One comment found that, rather than showing the flexibility of the regulations, this subsection gave the impression that the regulations were inflexible. The Council decided to delete this subsection as redundant, unnecessary, and confusing.

The "Timing" section of the September 1996 draft is now in § 800.1(c). One comment noted that while this section allows nondestructive project planning activities before completing compliance with section 106, it would be nonsensical to include the proviso that such actions cannot restrict subsequent consideration of alternatives to avoid, minimize or mitigate adverse effects. The Council, however, decided that this provision should remain since the Council believes that the section 106 process should not be circumvented by the early foreclosure of mitigating options.

Several other comments noted that including field investigations as nondestructive planning activities could open the door to actions that could actually alter the character of historic properties, thereby circumscribing the 106 process. The Council deleted the reference to field investigations in the final regulation. The Council believes that such investigations could sometimes, depending on the particular project, constitute non-destructive planning. However, for the reasons stated above, the Council believed that the blanket statement in the September 1996 draft should be deleted.

Another comment suggested that a Federal agency notify the SHPO if phased compliance is anticipated. However, the Council believed this could only be a marginally beneficial practice, and did not want to further lengthen the process by adding another notification requirement to its regulations.

Section 800.2

The September 1996 draft created various categories of participants in the Section 106 process: Principal parties, consulting parties, affected parties, the public and the interested public. Many comments stated that the proposed "classes" of parties were confusing and inappropriate, and that they unfairly designated status to certain parties while excluding others. In response to these comments, the final regulation eliminates these categories of parties. Instead, the final regulation creates one group of parties, known as "consulting parties" which includes the SHPO/THPO, certain Indian tribes and Native Hawaiian organizations, local governments, applicants, and additional consulting parties with a demonstrated legal or economic relationship to the undertaking or affected properties, or concern with the undertaking's effects on historic properties. The rights and responsibilities of the Federal agency, the Council and the public are identified separately throughout the regulation and are not placed in a group or category. The Council believes this eliminates confusion and clarifies the roles of the different parties.

Section 800.2(a)(2) of the final regulation sets forth the concept of a lead Federal agency. One comment stated that Federal agencies should be required to select a lead agency where multiple Federal agencies are involved in a project. The Council rejected this suggestion as it deemed it appropriate for Federal agencies to maintain sole discretion in deciding whether to select a lead agency to represent multiple agencies throughout the section 106

process. The Council believes Federal agencies are in a better position to determine whether selecting a lead agency would facilitate the 106 process on a particular undertaking.

Section 800.2(a)(4) was added to respond to concerns raised about the nature of consultation in the section 106 process. It incorporates provisions taken from other sections of the regulations.

Responding to concerns that there were no limitations in the Council's decision to enter the 106 process, with the possibility of added delays, the Council added § 800.2(b)(1) defining the circumstances under which it would enter the Section 106 process. Specific criteria guiding Council decisions to enter are found in a new Appendix A.

Section 800.2(c)(6) provides for "additional consulting parties" to be added to the consultation process. Some comments sought more detail in the regulation on the nature and extent of such parties' role in the process and how such parties are designated as consulting parties. The Council decided to provide such information in guidance material rather than in the regulation. The Council also points out that § 800.3(f) provides some detail on how additional consulting parties may be added.

Other comments expressed concern, believing that consulting party status should be given only to those individuals or entities with a "real" interest in the undertaking. Among other things, the concern was that, without somehow limiting this group of participants, the 106 process would be severely slowed down, increasing the economic and time costs of compliance without adequate justification. The Council responded to this concern by adding language stating that those with a "demonstrated interest in the undertaking may participate * * * due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties." The involvement of private property owners is contemplated by this language. In response to several comments, the Council deleted the language in the September 1996 draft which allowed Agency Officials to limit participation of owners of real property to organizations representing such owners. The Council agreed that the limitation could unfairly restrain property owner participation by virtually requiring they organize before being allowed to participate in the 106 process.

Section 800.3

This section changed minimally from the September 1996 draft. The Council simplified the language in subsection (a). One comment noted that the regulation provided no guidance as to how a Federal agency determines if an undertaking "has the potential to affect historic properties." The comment acknowledged that the existing regulations also did not provide specific criteria for such a determination. The Council decided that due to the broad differences among undertakings which would make such guidance too lengthy, this issue will be more appropriately addressed in supplementary guidance material to Federal agencies.

With regard to subsection (b), several comments stated that the Council exceeded its authority by requiring coordination of the section 106 process with reviews under other authorities. The Council maintains that coordination with other environmental reviews is extremely beneficial in achieving the best outcome under section 106. In response to comments questioning the Council's authority to mandate coordination, however, the Council made such coordination discretionary.

Subsection (c) in the September 1996 draft was moved to subsection (e) of the final rule. It was also amended to remove superfluous language in response to comments. It now requires the Agency Official to consult with the SHPO/THPO in planning for public involvement, in recognition of the inherent, specialized knowledge that such local entities possess regarding local parties which could have an interest on historic properties.

Subsection (c) of the final rule pertains to identification of the appropriate SHPO/THPO. It also includes general rules regarding consultation with the SHPO/THPO. The substance of this subsection was formally contained in subsection (d) of the September 1996 draft, although it has been amended to respond to comments. During the consultation meetings with Indian tribes, and as reflected in Indian tribe written comments, tribes expressed the concern that the role of tribal historic preservation officers who had assumed the role of state historic preservation officers under section 101 (d) (2) of the NHPA was not adequately addressed in the regulations. Because THPOs that have formally assumed SHPO duties on tribal lands act in lieu of SHPOs, many tribal comments suggested referencing "SHPO/THPO." By using this reference, Federal agencies will be reminded that

they must not only determine if their actions are on or will affect historic properties on tribal land, but they also must determine whether or not the tribe's THPO has formally assumed the role of SHPO. This change is a clarification of the language in § 800.12(B) of the September 1996 draft which set forth the rights of Indian tribes when undertakings are on tribal lands. That subsection addressed what would happen if an Indian tribe did not formally assume the responsibilities of the SHPO, but did not explain the role of the THPO vis-a-vis the SHPO where formal assumption did occur under 101(d)(2) of the NHPA.

With regard to the role of the THPO that has formally assumed the SHPO's role on tribal land, and responding to concerns that certain rights of property owners given by the NHPA could be overlooked or disregarded, the Council added a reference to the statutory language in section 101(d)(2)(D)(iii) of the NHPA, which authorizes certain property owners on tribal lands to request SHPO participation.

The September 1996 draft included in its subsection (d)(1), language directing Federal agencies to consult with the Council "if the State Historic Preservation Officer declines in writing to participate in the Section 106 process * * *." This language was deleted from the final rule in response to comments made, particularly during the OMB inter-agency review, that such language in the regulation appeared to condone SHPO refusal to participate in the 106 process as long as it was done in writing. Language referring to SHPO failure to respond was retained, but amended in response to comments. Many comments disapproved of the language "in a timely manner," as vague and confusing. The Council intended this language to refer back to the periods of time specified in the regulation for SHPO response. However, to avoid confusion and to also respond to other comments requesting definite time periods, the Council deleted the language and specified a 30 day response time. Additionally, in response to Federal agency comments asking for certainty and finality to the process, the Council included language on the regulation stating that the Federal agency could either proceed to the next step in the process or consult with the Council if the SHPO fails to respond. In response to SHPO concerns of being permanently left out of the rest of the 106, process, the Council allowed for SHPO re-entry into the process. However, in response to concerns about the need to cut down on delays and providing for timing certainty in the

process, the final regulations do not provide for reconsideration of previous findings or determinations that the SHPO failed to review.

Subsection (d) of the final rule contains language similar to that of § 800.12(b) of the September 1996 draft. However, the intent of the language has been clarified in response to tribal comments that the Council must make it clear that the Indian tribe's consent is necessary when on tribal lands, whether or not the THPO has formally assumed the SHPO's responsibilities.

Subsections (e) and (f) of the final rule contain similar language to that of subsection (c) and (e) in the September 1996 draft. In response to various comments that asked for clarity regarding participation and showed concern that participants could be left out of the process, the Council made it clear, under §§ 800.2(c)(5) and 800.3(f)(1), that applicants must be invited to be consulting parties.

The September 1996 draft stated that Agency Officials "shall identify" Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects. The language was changed so that Agency Officials "shall make a reasonable and good faith effort" to identify such tribes. This change was strongly requested by Federal agencies during the OMB review process, on the basis that there would be an inherent, extreme difficulty in identifying all such tribes when there is no clear guidance or list showing such tribes for each property in the entire United States that could be affected by an undertaking. After discussions with OMB, the Council acceded to the change, believing it strikes an adequate balance, consistent with the statute, between the need to consult such tribes and the practical concerns of identifying them. The Council, however, notes its understanding that a Federal agency is not making "a reasonable and good faith effort" to identify Indian tribes under this subsection if it possesses knowledge, through communication from Indian tribes or otherwise, that a particular Indian tribe attaches religious and cultural significance to a property to be affected by an undertaking, but still fails to identify such tribe in the 106 process. Such a lack of a reasonable and good faith effort would be contrary to the requirements of the NHPA.

Subsection (g) of the final rule contains language that was formally in subsection (d)(3). It was moved as a separate subsection to highlight the opportunity for expediting consultation. Language was added to clarify when

multiple steps in the process could be condensed, further streamlining the 106 process.

Section 800.4

The substance of § 800.4(a) changed minimally from the September 1996 draft. The first sentence in subsection (a) was deleted as it was determined to be redundant with the coordination subsection in § 800.3. The Federal agency responsibilities during the scoping of identification efforts also remained largely unchanged, except that reference to the documentation requirement for area of potential effects was added here. The duty to document the area of potential effects was listed in § 800.12 in the September 1996 draft and was added in § 800.3 to emphasize the significance of this step. The Council plans to provide further guidance on development of the area of potential effect to address comments seeking assistance in defining the area of potential effect. Some comments questioned the duty to consult with the SHPO/THPO during the determination of the area of potential effect. Consultation with the SHPO/THPO at this critical decision making point has always been viewed as an important part of the process. The Council decided to retain the duty to consult with the SHPO/THPO since the Council believes that SHPO/THPOs have special expertise as to the historic areas in their jurisdiction and the idiosyncracies of such areas, and can greatly assist the Agency Official, using such expertise, in determining an accurate area of potential effects. Nevertheless, it is noted that the Federal agency is ultimately responsible for making the final determination about the area of potential effect (i.e., the concurrence of the SHPO/THPO in such determination is not required).

One comment noted that, under the existing regulations, the public was not involved early in the identification efforts. Section 800.4(a)(3) requires that Federal agencies seek information from individuals or organizations likely to have knowledge of or concerns with historic properties in the area. This is an avenue for early public involvement.

Subsection (b) sets the standards for a Federal agency's identification of historic properties. This subsection was modified minimally to address several comments. In response to tribal concerns, the requirement to consult with Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to properties was moved to this part of the regulations. The substantive requirement had been set forth under § 800.12(c)(1) of the

September 1996 draft. In response to tribal concerns regarding the need for adequate safeguards for sensitive information, the Council added a sentence requiring Federal agencies to consider "confidentiality concerns" of Indian tribes and Native Hawaiian organizations.

The final rule also tied the "reasonable and good faith effort" standard to examples listed in subsection (b)(1). Council guidance will be developed to elaborate on the use of the various methods of identification depending on the facts of each undertaking to respond to those comments seeking clarification. One comment noted that the regulations should provide a mechanism for disputes over what constitutes a "reasonable and good faith effort." Section 800.2(b)(2) of the final rule sets forth that the Council can provide advice and assistance in resolution of disputes during the process.

The concept of "phased identification" was well received in the comments. The final rule, under § 800.4(b)(2), clarifies the applicability of phased identification. It also expands the notion of phasing to the evaluation step in the process, as suggested by several comments.

Section 800.4(b)(3) of the September 1996 draft, regarding the use of contractors by Agency Officials, was moved to § 800.2(a)(3) of the final rule.

With regard to the evaluation of historic properties, one comment stated the importance of allowing consensus determinations on eligibility whereby Federal agencies assume eligibility for the National Register without conducting a full evaluation, thus expediting the section 106 process. The Council provided for consensus determinations in subsection (c)(2) of the final rule and in the September 1996 draft in (c)(2).

In response to tribal comments about the importance of § 800.12(c)(1) of the September 1996 draft regarding determinations of eligibility, the Council incorporated language from that section into § 800.4(c)(2) of the final rule. In response to strong tribal concerns about the treatment of properties to which they attach religious and cultural significance and concerns that they would not be properly evaluated by those that do not attach such significance to the properties, the Council amended the regulatory language to provide an avenue for tribes that disagree with eligibility determinations regarding such properties to ask the Council to request the Federal agency to obtain a determination of eligibility.

Many SHPO comments strongly expressed concern about the 15-day review period in subsection (d) of the September 1996 draft, finding it too short for an adequate review of a determination of "no historic properties affected." In light of the sometimes limited resources and workloads of the SHPOs and the fact that the complexity of some determinations require more time for an adequate review, the Council agreed and extended the time for SHPO response to 30 days. The Council believes that the need for proper evaluation of this determination and the danger that an improper evaluation could result in damage to historic properties outweighs the interests of expediting the process by 15 days.

Section 800.5

Subsection (a)(1) changed only in that it incorporated the duty to consult with Indian tribes and Native Hawaiian organizations, that was found in § 800.12(c)(1) of the September 1996 draft. Other minor wording changes were made in response to comments to clarify that there is no new notice and comment requirement at this step. Thus, the words "which have been" were added to the last sentence. References to the term "interested public" were deleted, as such a category of participants was dropped, as described above.

With regard to subsection (a)(1), some comments took issue with the last sentence which contains the concept of indirect effects as not being included in the regulations to be superseded. The Council has always considered that "effect" as contained in the statutory language of Section 106 includes both direct and indirect effects. Therefore, it specified that in regulatory language, thereby retaining the requirement that indirect effects be considered by Federal agencies during section 106 process, as it similarly is during the NEPA process.

The wording of some of the examples of adverse effects in subsection (a)(2) was modified from the September 1996 draft to clarify the intent and application in response to comments.

Subsection (a)(3) was eliminated in the final rule, but the concept of avoidance as justifying a no adverse effect determination is incorporated into subsection (b). The subsection (a)(3) of the final rule expands upon the phasing of identification and evaluation efforts to include phasing of the application of adverse effect criteria under certain circumstances. Comments observed that such flexibility at this step in the process was essential if a Federal agency opted for phasing at the earlier identification and evaluation stages.

Subsection (a)(4), the standard treatment provision, in the September 1996 draft was completely removed from this section in the regulation. The standard treatment option is still contained generally in § 800.14(d) of the final rule. The Council removed the Standard Treatments on subsection (a)(4) because it believes that all such treatments should be arrived at through specific consultation about them, as provided under the final rule's § 800.14(d). This does not change their availability as a streamlining device under the regulations.

With regard to review of "no adverse effect" determinations, the final rule was amended to acknowledge that, although the Council will not review "no adverse effect" determinations as a routine matter, there may be certain circumstances where the Council will intervene and review the finding, even where there is SHPO/THPO agreement with the Federal agency. This would likely happen when a consulting party disagrees with the Agency Official's determination or when the Council, guided by the criteria in appendix A, decides that it should review the determination. Subsection (c)(1) of the final rule acknowledges this by adding the language "Unless the Council is reviewing the finding pursuant to § 800.5(c)(3) * * *." This was added in response to comments made by Indian tribes and preservation organizations that articulated the importance of the Council retaining its authority to overturn no adverse effect determinations.

Subsection (c)(2) of the final rule also amended the language, formerly in subsection (b)(2), that provided for disagreements between the SHPO and the Federal agency. The Council deleted the language requiring Federal agencies to "consider the effect adverse" if the SHPO/THPO disagreed with a no adverse effect finding. In the last sentence of (c)(2), the Council also changed the word "may" in the September 1996 draft to "shall" in the final rule, in response to several comments. Federal agency comments and others suggested giving the Federal agency the option of going back to the SHPO/THPO to resolve the disagreement or requesting Council review. Most Federal agencies, however, did not want the Council's position to be binding on the Federal agency, but merely advisory. The Council considered this concern, but rejected it as the Council maintains it has the right to interpret the correct application of its regulations. If an agency incorrectly applied the criteria of adverse effect, the Council viewed this as a misapplication

of its procedures. In response to comments which found it problematic that there was no time limit for Council review of no adverse effect determinations, the Council set a 15 day review period for such reviews in subsection (c)(3) and added language stating that the Agency Official could assume Council concurrence with the finding if the Council had not responded within that time frame.

Subsection (d) of § 800.5 of the final rule contains the language that was formerly in subsection (c) of the September 1996 draft. The first sentence of (d)(1) has been modified to remove notification requirements, but to make information available upon request. The notification requirement was moved to subsection (c) of the final rule. This was done in response to comments about the importance of early involvement of consulting parties.

Section 800.6

Subsection (a)(1) was modified to clarify that whenever an adverse effect determination was made, the Council was to receive notification, whether or not its participation was being requested. Several comments noted that this was not clear in the language of the September 1996 draft. The criteria for requesting Council involvement was also modified by moving (a)(1)(i)(D) to (a)(1)(ii) so that the parties listed in the provision could directly request Council involvement rather than going through the Federal agency. This was suggested by several comments as a more efficient, streamlined method to request Council intervention. The Council deleted the reference to its right to enter the process on its own initiative as was mentioned in the September 1996 draft at subsection (a)(1)(ii). Nevertheless, the Council maintains that right in the final rule pursuant to § 800.2(b)(1) and the Criteria in Appendix A.

Subsection (a)(2) of the final rule sets forth the duty to involve and invite, as appropriate, other individuals or entities to be consulting parties. This subsection changed minimally from the September 1996 draft, except that the sentence allowing the Council to serve as arbiter of disputes over consulting party status was removed in response to negative comments from Federal agencies that believed such Council involvement was inconsistent with its authority.

Subsection (a)(3) of the final rule was amended by adding the proviso that disclosure of information was subject to the confidentiality provision in the regulation. This was added in response to Federal agency concerns about disclosure of proprietary information

regarding private property owners and archeological sites, as well as Indian tribe concerns about disclosure of sensitive information regarding properties of traditional religious and cultural importance.

Subsection (a)(4) of the final rule was also amended by adding language on confidentiality for the reasons stated above.

Language was also added, in response to Federal agency comments, to elaborate on the factors that Federal agencies should consider when determining the appropriate way to involve members of the public. Additionally, in response to Federal agency comments concerned with duplicate efforts, particularly during the inter-agency review, the Council added a new sentence to acknowledge that earlier public involvement conducted by Federal agencies may, in certain circumstances affect the level of public notice and involvement at the resolution of adverse effect stage. For example, if all relevant information is provided at earlier stages in the process in such a way that a wide audience is reached, and no new information is available at that stage in the process that would assist in the resolution of adverse effects, then a new public notice may not be warranted.

Reference to section 304 of the NHPA was added in the final rule, under subsection (a)(5), in response to strong concerns expressed by Indian tribes regarding disclosure of sensitive information.

The subsection on resolution without the Council, § 800.6(b)(1), was amended in response to several comments questioning the meaning of the term "file" as used in the September 1996 draft. The term "file" was changed to "submit," and the documentation requirement was added to ensure that the Council had the information that it needed if it were to review the Memorandum of Agreement, as suggested by some comments. Language was added in § 800.6(b)(1)(iii) that the Council would notify the head of an agency when the Council decided to enter the section 106 process. This was in response to comments in the interagency review process and was intended to ensure that policy-level officials in the agency were aware of cases that warranted Council involvement. The last sentence in § 800.6(b)(1)(v) was added to explain the outcome if the Council decides not to join the consultation despite the request to do so.

Subsection (b)(2) was changed so that the phrase "avoid or minimize the adverse effects" was changed to "seek

ways to avoid, minimize or mitigate the adverse effects." This change was made in response to comments, in order to more appropriately reflect the essence of consultation behind the 106 process.

The final rule clarifies the status and rights of parties involved in the development of a Memorandum of Agreement as set forth in subsection (c). Many comments had found the treatment of these issues section in the September 1996 draft to be confusing. The Council redrafted the subsection by first moving the provision describing the legal effect of a Memorandum of Agreement to the beginning of the subsection. This was formerly in subsection (c)(5) of the September 1996 draft. Under § 800.6(c)(1) of the final rule, the Council also separated out the various signatories for different kind of agreements, adding a reference to the fact that the Council and the Federal agency can enter into a Memorandum of Agreement under § 800.7(a)(2). The final rule adds a new category of parties that may or should be invited to become signatories to the agreement as listed in subsections (c)(2)(i) and (ii); these parties will have the rights of signatories if they choose to sign the agreement after being invited. Subsection (c)(2)(iii) clarifies the outcome of such parties' refusal to sign the agreement. Another category of parties, different from signatories or those invited to become signatories, is concurring parties as set forth in subsection (c)(3). The remaining subsection on Memoranda of Agreement remained essentially the same except that, in response to comments, subsections (6) and (9) regarding subsequent discoveries were added.

Section 800.7

There were few comments on § 800.7. The Council made minimal changes to this section. In subsection (a), the Council added a sentence requiring the party terminating consultation to notify the consulting parties and to state in writing the reasons for terminating. This was done to ensure that termination was grounded in sound reasons and that other parties had full understanding of the basis for termination. The requirement that the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibility request Council comment when the Federal agency terminates was criticized in several comments that believed it was burdensome, unnecessary or beyond the authority of the Council. The Council retained the requirement for several reasons. First, section 110(1) of the NHPA, which was added in the 1992 amendments to require this. That

section requires that the head of such agency "shall document any decision made pursuant to section 106" where the Federal agency has not entered into a Memorandum of Agreement regarding undertakings which adversely affect historic properties. Second, as a matter of protocol, since the Council members, many of whom are Presidential appointees and include the heads of six Federal agencies, are responsible for commenting on a termination, the Council determined that it was appropriate for the request to be made at that level.

Subsection (a)(3) was added in response to tribe comment and in recognition of an Indian tribe's sovereign status with regard to its tribal lands. The requirement that a tribe must be a signatory to any agreement negotiated pursuant to § 800.6 was contained in the last sentence of § 800.12(b)(3) of the September 1996 draft.

Subsection (a)(4) was amended by giving the Council the option to avoid termination by going to the Federal agency Federal Preservation Officer to attempt resolution of issues. This option was suggested by several Federal agencies.

Subsection (b) was added to allow the Council to provide advisory comments even when a Memorandum of Agreement has been signed. This provision will give the Council the flexibility to agree to certain Memoranda of Agreement, but to supplement its signature with additional comments. This was suggested in one comment, and was determined by the Council to be a valuable vehicle for issuing advisory opinions to assist Federal agencies in their 106 compliance efforts.

In subsection (c)(3) the Council added the Federal Preservation Officer (FPO) as a recipient of a copy of the Council comments. This should assist the FPO in his/her agency-wide management of section 106 compliance.

Subsection (c)(4) pertaining to Federal agency response to Council comments was changed by adding the requirement that the agency head prepare a summary of the decision. This was added to ensure that the decision received adequate consideration by the agency head and, therefore, was properly documented, as required by section 110(1).

Section 800.8

This section of the regulations responds to the desire to streamline the 106 process and to coordinate it with the National Environmental Policy Act (NEPA) process. As stated before, most

commenters approved of the concept of NEPA coordination. However, many believed it did not streamline the process enough. The Council believes it has streamlined coordination with the NEPA process to the largest extent possible without unduly sacrificing the key components of the section 106 process. The standards by which NEPA coordination must be conducted reflect our understanding of such key components that could not be sacrificed without failing the letter and spirit of Section 106.

In response to a concern that a finding of adverse effect could incorrectly be thought as automatically triggering a requirement to produce an Environmental Impact Statement (EIS), the Council added the last sentence of § 800.8(a)(1) of the final regulation to make it clear that adverse effects on historic properties do not, by themselves, necessarily trigger an EIS requirement. However, they may be of such magnitude or combine with other environmental impacts to warrant preparation of an EIS. This is determined by the Federal agency in accordance with its NEPA procedures and applicable NEPA case law.

Tribal comments showed a concern that sensitive information would be published on the Environmental Impact Statement (EIS), and therefore be available for public distribution. The Council notes that § 800.8(c)(1)(iii) states that tribes must be consulted in the preparation of NEPA documents. The Council believes that the confidentiality concerns of the tribes could be addressed in these consultations. Moreover, § 800.8(c)(1)(ii) states that identification and effects determinations must be consistent with §§ 800.4 and 800.5, and that such sections address confidentiality concerns. Tribes could object to a NEPA coordination that is not consistent with this and other standards.

Certain comments cited a concern that § 800.8 could allow too many inappropriate reasons to prolong or repeat consultation. The Council has limited objections to the NEPA coordination on two bases: (a) That it does not meet the standards listed under subsection (c)(1), or (b) that substantive treatment of effects on historic properties on the NEPA documents are inadequate. The Council will review such objections within 30 days.

Comments from Federal agencies indicated that subsection (c)(5) inappropriately implied that the Agency Official would retain responsibility for measures in a Record of Decision (ROD) or Finding of No Significant Impact (FONSI) when another party may

actually carry those out. The Council therefore agreed to change the language to: "if the Agency Official fails to ensure that the measures * * * are carried out * * *" (the language used to state that the Agency Official "fails to carry out the measure * * *").

Section 800.9

Many comments found the review procedures set forth in § 800.9(a) of the September 1996 draft to be problematic. Comments found this subsection to be a backdoor, and unauthorized, appeals process that created a lack of finality to the 106 process. Comments also noted that the right to appeal to the Council was too limited, as only certain individuals who had participated in the process could make an appeal under subsection (a). Based on the strong adverse sentiment to this provision, the Council completely redrafted this subsection. The new subsection (a) succinctly and simply states that the Council can render its advisory opinion at any time in the 106 process regarding any compliance matters. Federal agencies are required to consider the Council's advisory opinion in reaching a decision on the matter. With this change, the Council believes it is responding to the concerns expressed in the comments about an elaborate appeals process. The change also addresses the concern that the Council was exceeding its authority as an advisory body, since the final rule acknowledges that the Council will issue advisory opinions.

Subsection (b) was changed in response to a comment which questioned the provision in the September 1996 draft that required the Council chairman to send a foreclosure finding to the head of an agency. The wording implied that the foreclosure decision was that of the Chairman, rather than the Council at large. It was always the intention that the decision was that of the Council at large so as to, among other things, reflect the diversity of the whole Council. The final rule merely deletes the reference to the Chairman.

Several comments sought more direction with regard to intentional adverse effects of applicants in subsection (c). The final rule, like the notice of proposed rulemaking, tracks the language in section 110(k) of the NHPA. Additionally, in response to comments, the Council set forth a procedure describing how it would consult with Federal agencies that make a preliminary determination that circumstances may justify granting assistance to the applicant. The section

110 Guidelines provide substantive guidance on this subject.

Subsection (d) provides for periodic reviews of how participants fulfill their responsibilities under section 106. Some comments questioned the Council's authority for such reviews, even in light of section 203 of the NHPA. The Council maintains the position that sections 202 and 203 of the NHPA clearly provide for the collection of information from Federal agencies regarding the section 106 process and for the Council to make recommendations to Federal agencies on improving compliance. In response to comments, nevertheless, the Council removed the reference to Council "oversight" from the final rule in subsection (d)(1).

Subsection (d)(2) of the September 1996 draft was deleted as unnecessary and confusing in that it introduced the concept of "professional peer review" without explanation. The Council determined that reference to this term was not appropriate or beneficial. The final rule's subsection (d)(2) contains the provision on improving the operation of section 106. This subsection remained largely unchanged, except that the last sentence was added to acknowledge the Council's authority under section 202(a)(6) of the NHPA to review Federal agency preservation programs and to make recommendations to improve their effectiveness.

Section 800.10

This section received few comments. One comment questioned the use of the phrase "directly and adversely" in subsection (a), finding it implied that indirect effects were not considered under this subsection. The Council retained the "directly and adversely" language of the September 1996 draft because it tracks the statutory language in the NHPA.

Another comment noted that it would be more appropriate to mandate that the National Park Service, instead of the Council, be involved in consultation over National Historic Landmarks. The regulations include a requirement that the Secretary of the Interior receive notice and an invitation to participate in such consultations and, thus, the Council has provided for involvement of the Secretary of the Interior whenever the Secretary wants to enter the consultation. The Council chose not to mandate the Secretary's participation.

The final rule contains a few other minor changes to rephrase headings and wording of subsections.

Section 800.11

The type of documents required to be submitted at various stages in the 106 process remained, for the most part, the same as presented in the September 1996 draft. Subsection (a) on adequacy of documentation and subsection (c) on confidentiality, were changed to respond to comments.

With regard to subsection (a), one comment questioned the use of the term "factual and logical" basis in the first sentence. The Council deleted this language as unnecessary. Also in response to a comment, the Council added language requiring the Council or SHPO/THPO to notify the Federal agency with the specific information needs to meet the documentation standards. This should expedite the process and assist the Federal agency in fulfilling its documentation requirements.

The Council had added specific language giving it the authority to resolve disputes over whether documentation standards are met. Some comments disagreed with the language in the September 1996 draft giving the Council or the SHPO/THPO the authority to determine the adequacy of documentation. Comments suggested requiring the Federal agency to consider the Council or SHPO views and supplement the record as the Agency Official determined it as necessary. The Council disagreed with these comments because it viewed the adequacy of documentation as an essential function for which the Council is able to provide its expertise. Council resolution of disputes over documentation would maintain consistency of documentation among Federal agencies. Additionally, the authority of the SHPO/THPO to notify Federal agencies that documentation is insufficient is necessary so that SHPOs/THPOs have the information that they need to respond to Federal agency determinations. Nevertheless, in light of strong opposition from commenters who were worried that, as written in the September 1996 draft, subsection (a) would cause unending delays in the section 106 process, the Council acceded to eliminating the language suspending relevant time periods until specified information was submitted. In addition, the Council relegated its role to one of "reviewing," as opposed to "resolving," document disputes.

Comments questioned the language under § 800.11(a) suspending the time periods when inadequate documentation is submitted, arguing that such provision would result in long delays. Another comment questioned

the meaning of "suspended", querying whether the SHPO/THPO would receive an additional 30 days after receipt of adequate documentation, or merely the remaining days left from when the SHPO/THPO notified the Federal agency that the documentation was inadequate. In order to alleviate concerns of delays in the process, the Council acceded to removing the suspension of time language. Nevertheless, Federal agencies must note that this does not lessen their obligation to meet applicable documentation standards, and that, not meeting such obligations could ultimately result in foreclosure or otherwise open their Section 106 compliance to challenge.

Subsection (c) containing the confidentiality provision, was modified by tracking the statutory language, almost verbatim, from section 304 of the NHPA rather than paraphrasing the main portion of the provision as was done in the September 1996 draft. This was done to more accurately describe the Federal agency responsibilities. At the end of subsection (c)(2), the Council added two sentences describing how it would consult with the Secretary on the withholding and release of information. This was added in response to various comments, particularly those of tribes who are concerned about the release of information of sacred sites. Subsection (c)(3) was added in response to comments made by Federal agencies and others about privacy concerns of applicants. It acknowledges that other laws or agency program requirements may limit access to information.

Minor additions and changes to enhance the clarity of the documentation requirements are made. Additionally, subsections (e) and (f) of the September 1996 draft were consolidated as they contained essentially the same material. In subsections (f) and (g)(4), the Council added "any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1)" in order to facilitate and expedite the review of information.

Section 800.12

As discussed above, former § 800.12 of the September 1996 draft contained the consultation requirements regarding Indian tribes and Native Hawaiian organizations. The provisions in that past section have been interspersed and incorporated into the relevant sections and subsections of the final rule for ease of reference to those reading the regulations, eliminating the need to flip back and forth between other sections of the regulations and this one. This

reorganization was also done in response to tribal concerns that the separate section did not facilitate integration of Indian tribes and Native Hawaiian organizations into the routine process. For the most part, the incorporation of those provisions into the other sections used existing language. Changes that were made in response to comments are noted at the specific section.

Section 800.12 of the final rule contains the provisions on emergency situations, formerly under § 800.13 of the September 1996 draft. The final rule incorporates several changes suggested by the comments. First, the Council deleted the reference to an "Agency Official" declaring a disaster or emergency, since it was pointed out that Agency Officials, as defined by the Council's regulations, do not have such authority, nor was it appropriate for the Council to grant them such authority. Second, in subsection (b), language was also added that had erroneously been left out, to acknowledge that the provision extended to other "immediate threat(s) to life or property." Third, the duty to consult with Indian tribes and Native Hawaiian organizations has been incorporated in response to tribal comments holding that this is mandated by the 1992 amendments to the NHPA.

One comment stated that demolition and repair operations should be exempt from section 106 when the following principles are at stake: Protection of lives, compliance with building codes, protection for property, maintenance of public health and safety, restoration of vital community services, or evaluation of post disaster engineering reports. The Council recognized many of these principles but believes it has struck the proper balance between the need to carry out the section 106 process and the need for expediency created by emergency situations. The last sentence of § 800.12 provides an exemption from section 106 compliance for immediate rescue and salvage operations conducted to preserve life or property, since the Council believed that emergency expediency in those situations outweighed section 106 process to such an extent that an exemption was warranted.

Section 800.13

This section, formerly found under § 800.14 of the September 1996 draft, was revised by the Council to simplify its provisions and to respond to various comments. Subsection (a)(1) was added in the final rule to highlight the benefit of planning for subsequent discoveries in Programmatic Agreements. Subsection (a)(2) contains language that

was in the September 1996 draft, except that mention of standard treatments containing provisions for subsequent discoveries was deleted as it was deemed inappropriate to include treatment for subsequent discoveries in standard treatments.

Subsection (b) was also changed by adding "or if construction on an approved undertaking has not commenced," as the Council realized that such a circumstance would also provide the opportunity for consultation. Subsection (b)(2) was amended in response to comments that indicated it was not clear, as drafted in the September 1996 draft, that the SHPO/THPO or the Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to the affected property have to agree that the property is of value solely for its scientific, prehistoric, history or archaeological data before the Archaeological and Historic Preservation Act could be used in lieu of Section 106. Subsection (b)(3) was changed minimally to clarify the intent that the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council have 48 hours in which to respond to a notification of an inadvertent discovery.

Subsection (d) was added as a result of comments made during the tribal consultation meetings and in deference to tribal sovereignty with regard to actions on tribal lands.

Section 800.14

This section was formerly found under § 800.15 of the September 1996 draft. It provides for new options for agencies to pursue in streamlining their section 106 compliance activities and incorporates the practice, under the regulations activities and incorporates the practice, under the regulations to be superseded, of developing Programmatic Agreements to facilitate coordination between Section 106 and an agency's particular program.

Regarding subsection (a), most of the Federal agency and industry commenters believed that the Federal agencies should be the ones determining the procedural consistency of program alternatives with Council regulations. Most SHPOs and Indian tribes believed the Council should make such consistency determinations. In the end, the Council opted to make the consistency determinations. The Council believes it has the internal experience and expertise to make such evaluations. Also, the diversity of its membership ensures that a balanced perspective is brought to final determinations regarding consistency.

Section 211 of the NHPA states that the Council "is authorized to promulgate such rules and regulations as it deems necessary to govern implementation of section 106 * * * in its entirety." Section 110(a)(2) of the NHPA states that the "(Federal agency historic preservation) program(s) shall ensure * * * that the agency's procedures for compliance with section 106 * * * are consistent with regulations issued by the Council * * *" (emphasis added). It must be understood, among other things and upon closer examination, that section 110 of the NHPA does not specifically provide for Federal agencies to substitute their programs for the Section 106 regulations promulgated by the Council. Through § 800.14(a) of the new regulations, the Council is allowing for such substitution, believing this may help agencies in their section 106 compliance. However, the Council will not allow such substitution if the agency procedures are inconsistent with the Council's 106 regulations. The Council, in its expertise, holds that its regulations correctly implement section 106, and that it would therefore be inimical to its mandate and contrary to the spirit and letter of section 100(a)(2)(E) of the NHPA, for the Council to allow inconsistent procedures to substitute the Council's section 106 regulations.

The last sentence under subsection (a)(4) was added during the OMB review process to allay concerns that 101(d)(5) agreements would be entered into without the knowledge and opportunity to comment of Federal agencies.

Subsection (b) is intended to retain the concept of Programmatic Agreements as in the superseded regulations, but with more clarity regarding required signatures, termination, and public participation. Programmatic Agreements should facilitate and streamline the Section 106 process regarding complex project situations or multiple undertakings.

Subsection (c) sets forth the process for exempting certain programs or categories of undertakings from the section 106 process. This is based on section 214 of the NHPA.

Subsection (f) was added in response to tribal comments that there needed to be specific requirements for Federal agencies to consult with Indian tribes during the preparation of program alternatives. The content follows the policies that have guided tribal consultation throughout the revisions of the regulation.

Section 800.15

This section was formerly under § 800.16 of the September 1996 draft. It

is presently reserved for future use. The Council will proceed with the review of tribal applications for substitution of tribal regulations for the Council's section 106 regulations on tribal lands, pursuant to section 101(d)(5) of the Act, on the basis of informal procedures. With regard to State agreements, the Council will keep in effect any currently valid State agreements until revised procedures for State agreements take effect or until the agreement is otherwise terminated.

Section 800.16

Few comments were received on the definitions and no substantial changes were made. There were some comments on the definition of "undertaking," requesting clarification of its scope. That has been done in the Section-by-Section analysis (Section VII).

VI. Summary of Major Changes From the Regulations Being Superseded

The revised section 106 regulations will significantly modify the process under the regulations to be superseded, introducing new streamlining while incorporating statutory changes mandated by the 1992 amendments to the NHPA. This section of the preamble highlights the major revisions in the process. Although there are many other refinements and improvements that cumulatively improve the operation of the section 106 process, they are not detailed here.

Major Changes

Greater deference to Federal agency-SHPO¹ decisionmaking. The Council will no longer review routine decisions agreed to by the Federal agency and the SHPO/THPO (adverse effect findings and most Memoranda of Agreement), recognizing that the capability of these parties to do effective preservation planning has grown substantially since the process was last revised in 1986.

More focused Council involvement. The Council will focus its attention on those situations where its expertise and national perspective can enhance the consideration of historic preservation issues. Criteria accompanying the regulation specify that the Council may enter the section 106 process when an undertaking has substantial impacts on important historic properties, presents important questions of policy or interpretation, has the potential for

¹The revised regulations extend to Tribal Historic Preservation Officers (THPO) the same role on tribal lands as the SHPO has in the section 106 process. Accordingly, this summary of changes refers to "SHPO/THPO" when the responsibilities for the SHPO and the THPO (with regard to tribal lands) are the same.

presenting compliance problems, or presents issues of concern to Indian tribes or Native Hawaiian organizations.

Better definition of participants' roles. The primary responsibility of the Federal agency for section 106 decisions is emphasized, while the advisory roles of the Council and the SHPO/THPO are clarified. The roles of other participants are more clearly defined, particularly Indian tribes, local governments and applicants, who may participate as "consulting parties." Certain individuals and organizations may also be entitled to be consulting parties, based on the nature of their relation to an undertaking and its effects on historic properties. Others may request to be involved. The exclusive role of the Federal agency to make the ultimate decision on the undertaking is stressed and the advisory roles of the other parties is clearly stated.

Native American roles defined and strengthened. The 1992 NHPA amendments placed major emphasis on the role of Indian tribes and other Native Americans. The revisions incorporate specific provisions for involving tribes when actions occur on tribal lands and for consulting with Indian tribes and Native Hawaiian organizations, as required by the NHPA, throughout the process. The revisions embody the principle that Indian tribes should have the same extent of involvement when actions occur on tribal lands as the SHPO does for actions within the States; this includes the ability to agree to decisions regarding significance of historic properties, effects to them and treatment of those effects, including signing Memoranda of Agreement. Off tribal lands, Federal agencies must consult the appropriate tribe or Native Hawaiian organization. The provisions recognize Federal agency obligations to consider properties to which the tribes attach religious and cultural significance in project planning. Provision is also made for the involvement of the Tribal Historic Preservation Officer in lieu of the SHPO for undertaking on tribal lands when that official has assumed the responsibilities of the SHPO in accordance with section 101(d)(2) of the NHPA.

Role of applicants recognized. The revisions acknowledge the direct interests of applicants for Federal assistance or approval and specify greater opportunities for active participation in the section 106 process as consulting parties. Applicants are permitted to initiate and pursue the steps of the process, while the Federal agency remains responsible for final decisions regarding historic properties.

Early compliance encouraged. Provisions have been added to encourage agencies to initiate compliance with the Section 106 process early in project planning and to begin consultation with the SHPO/THPO and others at that early stage. This should promote early agency consideration of historic properties in project planning and prevent late recognition of an agency's legal responsibilities that often cause delay or compliance problems.

Coordination with other reviews advanced. Agencies are encouraged to integrate Section 106 review with that required under the National Environmental Policy Act and related laws. Specific provisions that make identification and evaluation, public participation and documentation requirements more flexible facilitate this and will streamline reviews, allowing agencies to use information and analyses prepared for one law to be used to meet the requirements of another.

Use of NEPA compliance to meet Section 106 requirements authorized. Agencies are authorized to use the preparation of Environmental Impact Statements and Environmental Assessments under the National Environmental Policy Act to meet section 106 needs in lieu of following the specified Council process. This is expected to be a major opportunity for agencies with well-developed NEPA processes to simplify concurrent reviews, reduce costs to applicants and avoid redundant paperwork.

New techniques introduced to deal with marginal or routine cases. Federal agencies may seek exemptions from Section 106 or advisory comments on an entire program. Also, the Council may establish standard methods of treating recurring situations. This will allow agencies to save both time and resources that would otherwise be committed to legally-mandated reviews.

Public participation clarified. Opportunities for public involvement in the section 106 process are simplified and more clearly defined, with encouragement for Federal agencies to use their established public involvement procedures where appropriate. Clarification in this area will reduce controversy over the adequacy of an agency's efforts to involve the public.

Alternate Federal agency procedures flexed. The provisions allowing Federal agencies to substitute their internal procedures for the Council's section 106 regulations no longer require that the agency procedures be formal rules or regulations. This will make it easier for agencies to tailor the section 106

process to their needs. Approval of such substitute procedures is linked to requirements of section 110(a)(2)(E) of the NHPA.

Procedural Streamlining

The following section details changes in the basic Section 106 process. It demonstrates the technical alteration to the process to carry out the changes described previously.

"No effect" step simplified. To "no historic properties" and "no effect" determinations of the regulations being superseded are combined into a single "no historic properties affected" finding. The separate "effect" determination of the regulations being superseded is dropped and the agency moves directly to assessing adverse effects when it appears historic properties may be affected.

Identification and evaluation of historic properties made more flexible. The revised regulation introduces the concepts of phased identification and relating the level of identification to the nature of the undertaking and its likely impacts on historic properties. These concepts are important to effective NEPA coordination and will encourage more cost-effective approaches to survey and identification, as agencies will be able to make preliminary decisions on alternative locations or alignments without having to conduct the more intensive identification efforts necessary to deal with the final design and siting of a project.

Adverse effect criteria and exceptions revamped. The criteria are revised to better define when projects have adverse effects on historic properties. The "exceptions" to the criteria concerning rehabilitation of historic properties meeting the Secretary's Standards and transfer of Federal properties with preservation restrictions have been incorporated into the adverse effect criteria of the new regulations and expanded. Previously, much archaeological data recovery qualified for No Adverse Effect treatment when appropriate data recovery was undertaken. Such cases now will be treated as adverse effects (as the destruction of other historic properties), but other changes to the process will speed completion of the section 106 process.

Council review of No Adverse Effect determinations eliminated. The requirement that the Council review all No Adverse Effect determinations is replaced by SHPO/THPO review and concurrence. Consulting parties are authorized to ask the Council to review such a determination if the request is made in a timely manner.

Failure of Federal agency-SHPO/THPO consultation leads to Council involvement. If an agency and the SHPO/THPO failed to reach a solution to deal with adverse effects, the process required the Federal agency to seek the formal comments of the Council. The revised process requires the agency to invite the Council to join the consultation and help the parties reach resolution. Termination and comment would follow only if further consultation was not successful. This should result in more negotiated solutions, which are more efficient and usually provide better results.

Council comment provision reflects 1992 NHPA amendments. Council comments must be considered by the head of the Federal agency receiving them, as required by section 110(1) of NHPA.

Review of agency findings clarified. Recognizing that the Council's views on Federal agency actions to comply with section 106 are only advisory, a new provision allows anyone at anytime to seek the Council's opinion on agency findings and decisions under section 106. There is no obligation to delay agency action while the council conducts this review.

Emergency and post-review discoveries situations revised. Greater emphasis is placed on planning for unanticipated events and more flexible responses are allowed.

Council monitoring of overall Section 106 performance enhanced. The new regulations will shift the emphasis of Council review from individual cases to assessments of the overall quality of a Federal agency's or SHPO/THPO's performance in the section 106 process. The obligation of section 203 of the NHPA for agencies to provide project information to the Council is included. Also, provisions are made for closer Council review of cases where a participant has been found to have shortcomings in complying with section 106.

VII. Description of Meaning and Intent of Specific Sections

The following information clarifies the meaning and intent behind particular sections of the regulations.

Subpart A—Purposes and Participants Section 800.1(b)

This sections makes clear that references in the section 106 regulations are not intended to give any additional authority to implementing guidelines, policies or procedures issued by any other Federal agency. Where such provisions are cited, they are simply to

assist users in finding related guidance, which is non-binding, or requirements of related laws, which may be mandatory depending on the particular law itself.

Section 800.1(c)

The purpose of this section is to emphasize the flexibility an Agency Official has in carrying out the steps of the section 106 process, while acknowledging that early initiation of the process is essential and that actions taken to meet the procedural requirements must not restrict the effective consideration of alternatives related to historic preservation issues in later stages of the process.

Section 800.2(a)

The term "Agency Official" is intended to include those Federal officials who have the effective decision making authority for an undertaking. This means the ability to agree to such actions as may be necessary to comply with section 106 and to ensure that any commitments made as a result of the section 106 process are indeed carried out. This authority and the legal responsibilities under section 106 may be assumed by non-federal officials only when there is clear authority for such an arrangement under Federal law, such as under certain programs administered by the Department of Housing and Urban Development. This subsection indicates that the Agency Official "takes * * * financial responsibility for section 106 compliance * * *." This phrase is not to be construed as prohibiting Federal agencies from passing certain section 106 compliance costs to applicants. Such a construction of the regulation would contravene section 110(g) of the NHPA and 16 U.S.C. 469c-2. The intent behind the reference to "financial responsibility" in the regulation is, as stated above, to ensure that the Agency Official has the effective decision making authority for an undertaking.

Section 800.2(a)(1)

This reference to the Secretary's professional standards is intended to remind Federal agencies that this independent but related provision of the Act may affect their compliance with section 106.

Section 800.2(a)(2)

This provision allows, but does not require, Federal agencies to designate a lead agency for section 106 compliance purposes. The lead agency carries out the duties of the Agency Official for all aspects of the undertaking. The other Federal agencies may assist the lead

agency as they mutually agree. When compliance is completed, the other Federal agencies may use the outcome to document their own compliance with section 106 and must implement any provisions that apply to them. This provision does not prohibit an agency to independently pursue compliance with section 106 for its obligations under section 106, although this should be carefully coordinated with the lead agency. A lead agency can sign the Memorandum of Agreement for other agencies, so long as that is part of the agreement among the agencies for creating the lead agency arrangement. It should also be clear in the Memorandum of Agreement.

Section 800.2(a)(3)

While a Federal agency may rely on applicants or contractors to prepare necessary materials and assessments for section 106 purposes, the Agency Official must personally and independently make the findings and determinations required under these regulations. This includes assuming the responsibility for ensuring that work done by others meets applicable Federal requirements.

Section 800.2(a)(4)

This section sets forth the general concepts of consultation. It identifies the duty of Federal agencies to consult with other parties at various steps in the section 106 process and acknowledges that consultation varies depending on a variety of factors. It also encourages agencies to coordinate section 106 consultation with that required under other Federal laws and to use existing agency processes to promote efficiency.

Section 800.2(b)

The Council will generally not review the determinations and decisions reached in accordance with these regulations by the Agency Official and appropriate consulting parties and not participate in the review of most section 106 cases. However, because the statutory obligation of the Federal agency is to afford the Council a reasonable opportunity to comment on its undertaking's effects upon historic properties, the Council will oversee the section 106 process and formally become a party in individual consultations when it determines there are sufficient grounds to do so. These are set forth in appendix A. The Council also will provide participants in the section 106 process with its advice and guidance in order to facilitate completion of the section 106 review. Except as specifically noted in these

regulations, this advice and guidance is non-binding.

Section 800.2(c)

This section sets a standard for involving various consulting parties. The objective is to provide parties with an effective opportunity to participate in the section 106 process, relative to the interest they have to the historic preservation issues at hand.

Section 800.2(c)(1)

This section recognizes the central role of the SHPO in working with the Agency Official on section 106 compliance in most cases. It also delineates the manner in which the SHPO may get involved in the section 106 process when a THPO has assumed SHPO functions on tribal lands.

Section 800.2(c)(2)

The role of THPO was created in the 1992 amendments to the Act. This section tracks the statutory provision relating to THPO assumption of the SHPO's section 106 role on tribal lands. In such circumstances, the THPO substitutes for the SHPO and the SHPO participates in the section 106 process only as specified in § 800.2(c)(1) or as a member of the public. This section also specifies that in those instances where an undertaking occurs on or affects properties on tribal land and a THPO has not officially assumed the SHPO's section 106 responsibilities on those lands, the Agency Official still consults with the SHPO, but also consults with a representative designated by the Indian tribe. Such designation is made in accordance with tribal law and procedures. However, if the tribe has not designated such a representative, the Agency Official would consult with the tribe's chief elected official, such as the tribal chairman. For ease of reference in the regulation and because such designated tribal representative has the same rights and responsibilities under these regulations as a THPO that has assumed the SHPO's responsibilities, the term "THPO" has been defined as including the designated tribal representative.

Section 800.2(c)(3)

This section embodies the statutory requirement for Federal agencies to consult with Indian tribes and Native Hawaiian organizations throughout the section 106 process when they attach religious and cultural significance to historic properties that may be affected by an undertaking. It is intended to promote continuing and effective consultation with those parties throughout the section 106 process.

Such consultation is intended to be conducted in a manner that is fully cognizant of the legal rights of Indian tribes and that is sensitive to their cultural traditions and practices.

Section 800.2(c)(3)(i)

This subsection has two main purposes. First, it emphasizes the importance of involving Indian tribes and Native Hawaiian organizations early and fully at all stages of the section 106 process. Second, Federal agencies should solicit tribal views in a manner that is sensitive to the governmental structures of the tribes, recognizing that confidentiality and communication issues may require Federal agencies to allow more time for the exchange of information. Also, this section states that the Agency Official must make a "reasonable and good faith effort" to identify interested tribes and Native Hawaiian organizations. This means that the Agency Official may have to look beyond reservations and tribal lands in the project's vicinity to seek information on tribes that had been historically located in the area, but are no longer there.

Section 800.2(c)(3)(ii)

This subsection was added to make clear that nothing in these regulations can, or is intended to, modify any rights that Indian tribes maintain through treaties, sovereign status, or other legal bases.

Section 800.2(c)(3)(iii)

This subsection emphasizes the need to consult with Indian tribes on a government-to-government basis. The Agency Official must consult with the appropriate tribal representative, who must be selected or designated by the tribe to speak on behalf of the tribe. Matters of protocol are important to Indian tribes and Native Hawaiian organizations may be reluctant to share information about properties to which they attach religious and cultural significance. Federal agencies must recognize this and be willing to identify historic properties without compromising concerns about confidentiality. The Agency Official should also be sensitive to the internal workings of a tribe and allow the time necessary for the tribal decision making process to operate.

Section 800.2(c)(3)(iv)

This subsection reminds Federal agencies of the statutory duty to consult with Indian tribes and Native Hawaiian organizations whether or not the undertaking or its effects occur on tribal land. Agencies should be particularly

sensitive to identifying areas of traditional association with tribes or a Native Hawaiian organization, where properties to which they attach religious and cultural significance may be found.

Section 800.2(c)(3)(v)

Some Federal agencies have or may want to develop special working relationships with Indian tribes or Native Hawaiian organizations to provide specific arrangements for how they will adhere to the steps in the section 106 process and enhance the participation of tribes and Native Hawaiian organizations. Such agreements are not mandatory; they may be negotiated at the discretion of Federal agencies. The agreements cannot diminish the rights set forth in the regulations for other parties, such as the SHPO, without that party's express consent.

Section 800.2(c)(3)(vi)

The signature of tribes is required where a Memorandum of Agreement concerns tribal lands. However, if a tribe has not formally assumed the SHPO's responsibilities under section 101(d)(2) the tribe may waive its signature rights at its discretion. This will allow tribes the flexibility of allowing agreements to go forward regarding tribal land, but without condoning the agreement with their signature.

Section 800.2(c)(4)

Affected local governments must be given consulting party status if they so request. Under § 800.3(f)(1), Agency Officials are required to invite such local governments to be consulting parties. This subsection provides for that status and also reminds Federal agencies that some local governments may act as the Agency Official when they have assumed section 106 legal responsibilities, such as under certain programs administered by the Department of Housing and Urban Development.

Section 800.2(c)(5)

Applicants for Federal assistance or for a Federal permit, license or other approval are entitled to be consulting parties. Under section 800.3(f)(1), Agency Officials are required to invite them to be consulting parties. Also, Federal agencies have the legal responsibility to comply with section 106 of the NHPA. In fulfilling their responsibilities, Federal agencies sometimes choose to rely on applicants for permits, approvals or assistance to begin the section 106 process. The intent was to allow applicants to contact SHPOs and other consulting parties, but

agencies must be mindful of their government-to-government consultation responsibilities when dealing with Indian tribes. If a Federal agency implements its section 106 responsibilities in this way, the Federal agency remains legally responsible for the determinations. Applicants that may assume responsibilities under a Memorandum of Agreement must be consulting parties in the process leading to the agreement.

Section 800.2(c)(6)

This section allows for the possibility that other individuals or entities may have a demonstrated special interest in an undertaking and that Federal agencies and SHPO/THPOs should consider the involvement of such individuals or entities as consulting parties. This might include property owners directly affected by the undertaking, non-profit organizations with a direct interest in the issues or affected businesses. Under § 800.3(f)(3), upon written request and in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, an Agency Official may allow certain individuals under § 800.2(c)(6) to become consulting parties.

Section 800.2(d)(1)

Public involvement is a critical aspect of the 106 process. This section is intended to set forth a standard that Federal agencies must adhere to as they go through the Section 106 process. The type of public involvement will depend upon various factors, including but not limited to, the nature of the undertaking, the potential impact, the historic property, and the likely interest of the public. Confidentiality concerns include those specified in section 304 of the Act and legitimate concerns about proprietary information, business plans and privacy of property owners.

Section 800.2(d)(2)

This subsection is intended to set the notice standard. Notice, with sufficient information to allow meaningful comments, must be provided to the public so that the public can express its views during the various stages and decision making points of the process.

Section 800.2(d)(3)

It is intended that Federal agencies have flexibility in how they involve the public, including the use of NEPA and other agency planning processes, as long as opportunities for such public involvement are adequate and

consistent with subpart A of the regulations.

Subpart B—The Section 106 Process
Section 800.3

This new section is intended to encourage Federal agencies to integrate the section 106 process into agency planning at its earliest stages.

Section 800.3(a)

The determination of whether or not an undertaking exists is the Agency Official's determination. The Council may render advice on the existence of an undertaking, but ultimately this remains a Federal agency decision.

Section 800.3(a)(1)

This section explains that if there is an undertaking, but there is no potential that the undertaking will have an effect on an historic property, then the agency is finished with its section 106 obligations. There is no consultation requirement for this decision.

Section 800.2(a)(2)

This is a reminder to Federal agencies that adherence to the standard 106 process in subpart B is inappropriate where the undertaking is governed by a program alternative established pursuant to § 800.14.

Section 800.3(b)

This section does not impose a mandatory requirement on Federal agencies. It emphasizes the benefit of coordinating compliance with related statutes so as to enhance efficiency and avoid duplication of efforts, but the decision is up to the Agency Official. Agencies are encouraged to use the information gathered for these other processes to meet section 106 needs, but the information must meet the standards in these regulations.

Section 800.3(c)

This sets forth the responsibility to properly identify the appropriate SHPO or THPO that must be consulted. If the undertaking is on or affects historic properties on tribal lands, then the agency must determine what tribe is involved and whether the tribe has assumed the SHPO's responsibilities for section 106 under section 101(d)(2) of the Act. A list of such tribes is available from the National Park Service.

Section 800.3(c)(1)

This section reiterates that the THPO may assume the role of the SHPO on tribal land and tracks the language of the Act in specifying how certain owners of property on tribal lands can

request SHPO involvement in a Section 106 case in addition to the THPO.

Section 800.3(c)(2)

This section is the State counterpart to Federal lead agencies and has the same effect. It allows a group of SHPOs to agree to delegate their authority under these regulations for a specific undertaking to one SHPO.

Section 800.3(c)(3)

This section reinforces the notion that the conduct of consultation may vary depending on the agency's planning process, the nature of the undertaking and the nature of its effects.

Section 800.3(c)(4)

This section makes it clear that failure of an SHPO/THPO to respond within the time frames set by the regulation permit the agency to assume concurrence with the finding or to consult about the finding or determination with the Council in the SHPO/THPO's absence. It also makes clear that subsequent involvement by the SHPO/THPO is not precluded, but the SHPO/THPO cannot reopen a finding or determination that it failed to respond to earlier.

Section 800.3(d)

This section specifies that, on tribal lands, the Agency Official consults with both the Indian tribe and the SHPO when the tribe has not formally assumed the responsibilities of the SHPO under section 101(d)(2) of the Act. It also allows the section 106 process to be completed even when the SHPO has decided not to participate in the process, and for the SHPO and an Indian tribe to develop tailored agreements for SHPO participation in reviewing undertaking on the tribe's lands.

Section 800.3(e)

This section requires the Agency Official to decide early how and when to involve the public in the section 106 process. It does not require a formal "plan," although that might be appropriate depending upon the scale of the undertaking and the magnitude of its effects on historic properties.

Section 800.3(f)

This is a particularly important section, as it requires the Agency Official at an early stage of the section 106 process to consult with the SHPO/THPO to identify those organizations and individuals that will have the right to be consulting parties under the terms of the regulations. These include local government, Indian tribes and Native

Hawaiian organizations and applicants for Federal assistance or permits, especially those who may assume a responsibility under a Memorandum of Agreement (see § 800.6(c)(2)(ii)). Others may request to be consulting parties, but that decision is up to the Agency Official.

Section 800.3(g)

This section makes it clear that an Agency Official can combine individual steps in the section 106 process with the consent of the SHPO/THPO. Doing so must protect the opportunity of the public and consulting parties to participate fully in the Section 106 process as envisioned in Section 800.2.

Section 800.4(a)

This section sets forth the consultative requirements involved in the scoping efforts at the beginning stages of the identification process. The Agency Official must consult with the SHPO/THPO in fulfilling the steps in subsections (1) through (4). This section emphasizes the need to consult with the SHPO/THPO at all steps in the scoping process. It also highlights the need to seek information from Indian tribes and Native Hawaiian organizations with regard to properties to which they attach religious and cultural significance, while being sensitive to confidentiality concerns. Where Federal agencies are engaged in an action that is on or may affect ancestral, aboriginal or ceded lands, Federal agencies must consult with Indian tribes and Native Hawaiian organizations with regard to properties of traditional religious and cultural significance on such lands.

Section 800.4(b)

This section sets out the steps an Agency Official must follow to identify historic properties. It is close to the section 106 process under the regulations to be superseded, with increased flexibility of timing and greater involvement of Indian tribes and Native Hawaiian organizations in accordance with the 1992 amendments to the Act.

Section 800.4(b)(1)

This section on level of effort required during the identification processes has been added to allow for flexibility. It sets the standard of a reasonable and good faith effort on behalf of the agency to identify properties and provides that the level of effort in the identification process depends on numerous factors including, among others listed, the nature of the undertaking and its corresponding potential effects on historic properties.

Section 800.4(b)(2)

This new section is also intended to provide Federal agencies with flexibility when several alternatives are under consideration and the nature of the undertaking and its potential scope and effect has therefore not yet been completely defined. The section also allows for deferral of final identification and evaluation if provided for in an agreement with the SHPO/THPO or other circumstances. Under this phased alternative, Agency Officials are required to follow up with full identification and evaluation once project alternatives have been refined or access has been gained to previously restricted areas. Any further deferral of final identification would complicate the process and jeopardize an adequate assessment of effects and resolution of adverse effects.

Section 800.4(c)

This section sets out the process for determining the National Register eligibility of properties not previously evaluated for historic significance. It follows closely the regulations to be superseded.

Section 800.4(c)(1)

This section sets out the process for eligibility determinations in much the same way as the regulations to be superseded, but requires Federal agencies to acknowledge the special expertise of Indian tribes and Native Hawaiian organizations when assessing the eligibility of a property to which they attach religious and cultural significance. If either objects to a determination of eligibility, they may seek the Council to have the matter referred to the Keeper. The Council retains discretion on whether or not to submit such referral.

Section 800.4(c)(2)

This section remains largely unchanged from the regulations to be superseded except that it provides that if an Indian tribe or Native Hawaiian organization disagrees with a determination of eligibility involving a property to which it attaches religious and cultural significance, then the tribe can ask the Council to request that the Agency Official obtain a determination of eligibility. The Council retains the discretion as to whether or not it should make the request of the Agency Official. This section was intended to provide a way to ensure appropriate determinations regarding properties, located off tribal lands, to which tribes attach religious and cultural significance.

Section 800.4(d)

This section now combines the "No Historic Properties" and "No Effect" findings of the regulations to be superseded.

Section 800.4(d)(1)

This section describes the closure point in the Section 106 process where no historic properties are found or no effects on historic properties are found. Consulting parties must be specifically notified of the determination, but members of the public need not receive direct notification; the Federal agency must place its documentation in a public file prior to approving the undertaking, and provide access to the information when requested by the public. Once the consulting parties are notified, the SHPO/THPO has 30 days to object to the determination. The Council may also object on its own initiative within the time period. Lack of such objection within the 30 day period means that the agency need not take further steps in the section 106 process.

Section 800.4(d)(2)

This section requires that the Federal agency proceed to the adverse effect determination step where it finds that historic properties may be affected or the SHPO/THPO or Council objects to a no historic properties affected finding. The agency must notify all consulting parties.

Section 800.5

This section is similar to the provisions for assessing adverse effects under the regulations to be superseded, but the role of the Council is significantly altered and a role is provided for Indian tribes, Native Hawaiian organizations and other consulting parties.

Section 800.5(a)

This section has been minimally changed except that it provides for Indian tribe and Native Hawaiian organization consultation where properties to which they attach religious and cultural significance are involved. This section also requires the Agency Official to consider the views of consulting parties and the public that have already been provided to the Federal agency.

Section 800.5(a)(1)

This section has important changes from the regulations to be superseded. It combines the effect criteria and adverse effect criteria as defined in the regulation to be superseded. This section has also been modified to codify the practice of the Council in

considering both direct and indirect effects in making an adverse effect determination. This section allows for consideration of effects on the qualifying characteristics of a historic property that may not have been part of the property's original eligibility evaluation. The last sentence in this section is intended to amplify the indirect effects concept, similar to the NEPA regulations, which calls for consideration of such effects when they are reasonably foreseeable effects.

Section 800.5(a)(2)(i)

This section contains the minor change of deleting the word "alteration". The alteration adverse effect concept is retained in the next subsection.

Section 800.5(a)(2)(ii)

The list of examples of adverse effects has been modified by eliminating the exceptions to the adverse effect criteria. However, if a property is restored, rehabilitated, repaired, maintained, stabilized, remediated or otherwise changed in accordance with the Secretary's standards, then it will not be considered an adverse effect.

Section 800.5(a)(2)(iii)

This subsection, along with § 800.5(a)(2)(I), would encompass recovery of archeological data as an adverse effect, even if conducted in accordance with the Secretary's standards. This change from the regulations to be superseded acknowledges the reality that destruction of a site and recovery of its information and artifacts is adverse. It is intended that by eliminating data recovery as an exception to the adverse effect criteria, Federal agencies will be more inclined to pursue other forms of mitigation, including avoidance and preservation in place, to protect archeological sites. The Council is publishing for comment concurrent with this regulation a proposal to deal with recovery of archeological data as a standard treatment in accordance with § 800.14. It is the Council's intent to retain an expedited format for resolution and reaching agreements where values other than scientific research are not involved.

Section 800.5(a)(2)(iv)

This section was changed to more closely track the National Register criteria regarding the relation of alterations to a property's use or setting to the significance of the property.

Section 800.5(a)(2)(v)

This section was changed to more closely track the language of the National Register criteria as it pertains to the property's integrity.

Section 800.5(a)(2)(vi)

This section was modified to acknowledge that where properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations are involved, neglect and deterioration may be recognized as qualities of those properties and thus may not necessarily constitute an adverse effect.

Section 800.5(a)(2)(vii)

If a property is transferred leased or sold out of Federal ownership with proper preservation restrictions, then it will not be considered an adverse effect as in the regulations to be superseded. Transfer between Federal agencies is not an adverse effect per se; the purpose of the transfer should be evaluated for potential adverse effects, so that they can be considered before the transfer takes place.

Section 800.5(a)(3)

This section is intended to allow flexibility in Federal agency decision making processes and to recognize that phasing of adverse effect determinations, like identification and evaluation, is appropriate in certain planning and approval circumstances, such as the development of linear projects where major corridors are first assessed and then specific route alignment decisions are made subsequently.

Section 800.5(b)

This section has been modified to allow SHPO/THPO's the ability to suggest changes in a project or impose conditions so that adverse effects can be avoided and thus result in a no adverse effect determination. It is also written to emphasize that a finding of no adverse effect is only a proposal when the Agency Official submits it to the SHPO/THPO for review. This provision also acknowledges that the practice of "conditional No Adverse Effect determinations" is acceptable.

Section 800.5(c)

The Council will cease reviewing no adverse effect determinations on a routine basis. The Council will intervene and review no adverse effect determinations if it deems it appropriate based on the criteria listed in appendix A or if the SHPO/THPO or another consulting party and the Federal agency disagree on the finding and the agency

cannot resolve the disagreement. The SHPO/THPO and any consulting party wishing to disagree to the finding must do so within the 30-day review period. If Indian tribes or Native Hawaiian organizations disagree with the finding, they can request the Council's review directly, but this must be done within the 30 day review period. If a SHPO/THPO fails to respond to an Agency Official finding within the 30 day review period, then the Agency Official can consider that to be SHPO/THPO agreement with the finding. When a finding is submitted to the Council, it will have 15 days for review; if it fails to respond within the 15 days, then the Agency Official may assume Council concurrence with the finding. When it reviews no adverse effect determinations, the Council will limit its review to whether or not the criteria have been correctly applied. The Council's determination is binding.

Section 800.5(d)

Agencies must retain records of their findings of no adverse effect and make them available to the public. This means that the public should be given access to the information, subject to FOIA and other statutory limits on disclosure such as section 304 of the NHPA, when they so request. Failure of the agency to carry out the undertaking in accordance with the finding requires the Agency Official to reopen the Section 106 process and determine whether the altered course of action constitutes an adverse effect. A finding of adverse effect requires further consultation on ways to resolve it.

Section 800.6

The process for resolving adverse effects has been changed to reflect the altered role of the Council and the consulting parties.

Section 800.6(a)(1)

When adverse effects are found, the consultation must continue among the Federal agency, SHPO/THPO and consulting parties to attempt to resolve them. The Agency Official must notify the Council when adverse effects are found and should invite the Council to participate in the consultation when the circumstances in § 800.6(a)(1)(I) (A)-(C) exist. A consulting party may also request the Council to join the consultation. The Council will decide on its participation within 15 days of receipt of a request, basing its decision on the criteria set forth in appendix A. Whenever the Council decides to join the consultation, it must notify the Agency Official and the consulting parties. It must also advise the head of the Federal agency of its decision to

participate. This is intended to keep the policy level of the Federal agency apprised of those cases that the Council has determined present issues significant enough to warrant its involvement.

Section 800.6(a)(2)

This section allows for the entry of new consulting parties if the agency and the SHPO/THPO (and the Council, if participating) agree. If they do not agree, it is desirable for them to seek the Council's opinion on the involvement of the consulting party. Any party, including applicants, licensees or permittees, that may have responsibilities under a Memorandum of Agreement must be invited to participate as consulting parties in reaching the agreement.

Section 800.6(a)(3)

This section specifies the Agency Official's obligation to provide project documentation to all consulting parties at the beginning of the consultation to resolve adverse effects. Particular note should be made of the reference to the confidentiality provisions.

Section 800.6(a)(4)

The Federal agency must provide an opportunity for members of the public to express their views on an undertaking. The provision embodies the principles of flexibility, relating the agency effort to various aspects of the undertaking and its effects upon historic properties. The Federal agency must provide them with notice such that the public has enough time and information to meaningfully comment. If all relevant information was provided at earlier stages in the process in such a way that a wide audience was reached, and no new information is available at this stage in the process that would assist in the resolution of adverse effects, then a new public notice may not be warranted. However, this presumes that the public had the opportunity to make its views known on ways to resolve the adverse effects.

Section 800.6(a)(5)

Although it is in the interest of the public to have as much information as possible in order to provide meaningful comments, this section acknowledges that information may be withheld in accordance with Section 304 of the NHPA. Particular attention is given to the confidentiality concerns of Indian tribes and Native Hawaiian organizations.

Section 800.6(b)

If the Council is not a part of the consultation, then a copy of the Memorandum of Agreement must be sent to the Council so that the Council can include it in its files to have an understanding of a Federal agency's implementation of section 106. This does not provide the Council an opportunity to reopen the specific case, but may form the basis for other actions or advice related to an agency's overall performance in the Section 106 process.

Section 800.6(b)(1)

When resolving adverse effects without the Council, the Agency Official consults with the SHPO/THPO and other consulting parties to develop a Memorandum of Agreement. If this is achieved, the agreement is executed between the Agency Official and the SHPO/THPO and filed with required documentation with the Council. This filing is the formal conclusion of the Section 106 process and must occur before the undertaking is approved. Standard treatments adopted by the Council may set expedited ways for competing memoranda of agreement in certain circumstances.

Section 800.6(b)(2)

When the Council is involved, the consultation proceeds in the same manner, but the agreement of the Agency Official, the SHPO/THPO and the Council is required for a Memorandum of Agreement.

Section 800.6(c)

This section details the provisions relating to Memoranda of Agreement. This document evidences an agency's compliance with section 106 and the agency is obligated to follow its terms. Failure to do so requires the Agency Official to reopen the Section 106 process and bring it to suitable closure as prescribed in the regulations. The reference to section 110(1) of the Act is intended to conform the streamlining provisions of these regulations with current statutory requirements, pending amendment of that section.

Section 800.6(c)(1)

This section sets forth the rights of signatories to an agreement and identifies who is required to sign the agreement under specific circumstances. The term "signatory" has a special meaning as described in this section, which is the ability to terminate or agree to amend the Memorandum of Agreement. The term does not include others who sign the agreement as concurring parties.

Section 800.6(c)(2)

Certain parties may be invited to be signatories in addition to those specified in § 800.6(c)(1). They include individuals and organizations that should, but do not have to, sign agreements. It is particularly desirable to have parties who assume obligations under the agreement become formal signatories. However, once invited signatories sign MOAs, they have the same rights to terminate or amend the MOA as the other signatories.

Section 800.6(c)(3)

Other parties may be invited to concur in agreements. They do not have the rights to amend or terminate an MOA. Their signature simply shows that they are familiar with the terms of the agreement and do not object to it.

Sections 800.6(c)(4)–(9)

These sections set forth specific features of a Memorandum of Agreement and the way it can be terminated or amended.

Section 800.7

This section specifies what happens when the consulting parties cannot reach agreement. Usually when consultation is terminated, the Council renders advisory comments to the head of the agency, which must be considered when the final agency decision on the undertaking is made.

Section 800.7(a)(1)

This section requires that the head of the agency or an Assistant Secretary or officer with major department-wide or agency-wide responsibilities must request Council comments when the Agency Official terminates consultation. This requirement was added because section 110(1) of the NHPA requires heads of agencies to document their decision when an agreement has not been reached under section 106. If the agency head is responsible for documenting the decision, it is appropriate that the same individual request the Council's comments.

Section 800.7(a)(2)

This section allows the Council and the Agency Official to conclude the section 106 process with a Memorandum of Agreement between them if the SHPO terminates consultation.

Section 800.7(a)(3)

If a THPO terminates consultation, there can be no agreement with regard to undertakings that are on or affect properties on tribal lands and the Council will issue formal comments.

This provision respects the tribe's unique sovereign status with regard to its lands.

Section 800.7(a)(4)

This section governs cases where the Council terminates consultation. In that case, the Council has the duty to notify all consulting parties prior to commenting. The role given to the Federal Preservation Officer is new and is intended to fulfill the NHPA's goal of having a central official in each agency to coordinate and facilitate the agency's involvement in the national historic preservation program.

Section 800.7(b)

This section allows the Council to provide advisory comments even though it has signed a Memorandum of Agreement. It is intended to give the Council the flexibility to provide comments even where it has agreed to sign an MOA. Such comments might elaborate upon particular matters or provide suggestions to Federal agencies for future undertakings.

Section 800.7(c)

This section gives the Council 45 days to provide its comments to the head of the agency for a response by the agency head. When submitting its comments, the Council will also provide the comments to the Federal Preservation Officer, among others, for information purposes.

Section 800.7(c)(4)

This section specifies what it means to "document the agency head's decision" as required by section 110(1) when the Council issues its comment to the agency head.

Section 800.8

This major new section guides how Federal agencies can coordinate the section 106 process with NEPA compliance. It is intended to allow compliance with section 106 to be incorporated into the NEPA documentation process while preserving the legal requirements of each statute.

Section 800.8(a)(1)

This section encourage agencies to coordinate NEPA and section 106 compliance early in the planning process. It emphasizes that impacts on historic properties should be considered when an agency makes evaluations of its NEPA obligations, but makes clear that an adverse effect finding does not automatically trigger preparation of an EIS.

Section 800.8(a)(2)

This section encourages consulting parties in the section 106 process to be prepared to consult with the Agency Official early in the NEPA process.

Section 800.8(a)(3)

This section encourages agencies to include historic preservation issues in the development of various NEPA assessments and documents. This is essential for effective coordination between the two processes. It is intended to discourage agencies from postponing consideration of historic properties under NEPA until later initiation of the section 106 process.

Section 800.8(b)

this section notes that a project, activity or program that falls within a NEPA categorical exclusion may still require section 106 review. An exclusion from NEPA does not necessarily mean that section 106 does not apply.

Section 800.8(c)

This section offers Federal agencies an opportunity for major procedural streamlining when NEPA and section 106 both apply to a project. It allows the agency, when specific standards are met, to substitute preparation of an EA or an EIS for the specific steps of the Section 106 process set out in these regulations.

Section 800.8(c)(1)

This section lists the standards that must be adhered to when developing NEPA documents that are intended to incorporate 106 compliance. They are intended to ensure that the objectives of the section 106 process are being met even though the specific steps of the process are not being followed.

Section 800.8(c)(2)

This section provides for Council and consulting party review of the agency's environmental document within NEPA's public comment review time frame. Consulting parties and the Council may object prior to or within this time frame to adequacy of the document.

Section 800.8(c)(3)

If there is an objection to the NEPA document, the Council has 30 days to state whether or not it agrees with the objection. If the Council agrees with the objection, the Agency Official must complete the Section 106 process through development of a Memorandum of Agreement or obtaining formal Council comment (§ 800.6-7). If it does

not, then the Agency Official can complete its review under § 800.8.

Section 800.8(c)(4)

This subsection explains how Agency Officials using NEPA coordination must finalize their section 106 compliance for those cases where an adverse effect is found. The FONSI or ROD, as appropriate must document the proposed mitigation measures. In addition, a binding commitment with the proposed measures must be adopted. In the case of a FONSI, the binding commitment must be in the form of an MOA, drafted in accordance with § 800.6(c). Although the regulations do not send Agency Officials back to § 800.6(b) (regarding consultation towards an MOA), Agency Officials are reminded of the standards they must still follow under § 800.8(c)(1), and specifically the mitigation measures' consultation under § 800.8(c)(1)(v). In the case of an EIS, although a Memorandum of Agreement under § 800.6(c) is not required, an appropriate binding commitment must still be adopted. Finally, the subsection also clarifies the Agency Official's obligation to ensure that its approval of the undertaking is conditioned accordingly.

Section 800.8(c)(5)

This section requires Federal agencies to supplement their NEPA documents or abide by §§ 800.3 through 800.6 in the event of a change in the proposed undertaking that alters the undertaking's impact on historic properties.

Section 800.9

This section delineates the methods the Council will use to oversee the operation of the section 106 process. The Council draws upon its general advisory powers and specific provisions of the NHPA to conduct these actions.

Section 800.9(a)

This section emphasizes the right of the Council to provide advice at any time in the process on matters related to the section 106 process. Federal agencies should consider the Council's views, but need not adhere to them, unless specifically provided for in the regulation.

Section 800.9(b)

A foreclosure means that an agency has gone forward with an undertaking to such an extent that the Council can not provide meaningful comments. A finding of foreclosure by the Council means that the Council has determined that the Federal agency has not fulfilled its section 106 responsibilities with

regard to the undertaking. Such a finding does not trigger any specific action, but represents the opinion of the Council as the agency charged by statute with issuing the regulations that implement section 106.

Section 800.9(c)

This section reiterates the requirements of section 110(k) of the Act added in 1992. It also provides a process by which the Council will comment if the Federal agency decides that circumstances may justify granting the assistance. If after considering the comments, the Federal agency does decide to grant the assistance, then the Federal agency must comply with section 106 for any historic properties that still may be affected. This does not require duplication of consultation that may have already taken place with the Council in the course of addressing 110(k), but is intended to ensure that the agency has meaningful consultation with the Council as to mitigating adverse effects if the agency decides to proceed with approving the undertaking.

Section 800.9(d)

As the Council reduces its involvement in routine cases it will be focusing its efforts more and more on agency programs and overall compliance with the section 106 process. The NHPA authorizes the Council to obtain information from Federal agencies and make recommendations on improving operation of the section 106 process. If the Council finds that an agency or a SHPO/THPO has not carried out its section 106 responsibilities properly, it may enter the section 106 process on an individual case basis to make improvement. The Council may also review agency operations and performance and make specific recommendations for improvement under section 202(a)(6) of the Act.

Section 800.10

This section provides a process for how Federal agencies must afford the Council a reasonable opportunity to comment on historic landmarks. It is largely unchanged from the process under the regulations to be superseded.

Section 800.11

This section sets forth the requirements for documentation at various steps in the section 106 process. It has been amended to make documentation requirements clearer and to promote agency use of documentation prepared for other planning requirements.

Section 800.11(a)

The section allows for the phasing of documentation requirements when an agency is conducting phased identification and evaluation. The Council can advise on the resolution of disputes over adherence to documentation standards. However, the ultimate responsibility for the compiling adequate documentation rests with the agency. During the consideration of any disputes over documentation, the process is not formally suspended. However, agencies should resolve significant disputes before going forward too far in the Section 106 process in order to avoid subsequent delays.

Section 800.11(b)

This section was added primarily to allow for the use of documents prepared for NEPA or other agency planning processes to fulfill this provision as long as those documents meet the standards in this section.

Section 800.11(c)

This section is intended to protect the rights of private property owners with regard to proprietary information, and Indian tribes and Native Hawaiian organizations with regard to properties to which they attach religious and cultural significance. This section emphasizes that the regulations are subject to any other Federal statutes which protect certain kinds of information from full public disclosure. The role of the Secretary and the process of consultation with the Council are based on the statutory requirements of section 304 of the Act.

Section 800.11(d)-(f)

These sections specify the documentation standards for various findings or actions in the section 106 process. They are incrementally more detailed as the historic preservation issues become more substantial or complex. Each is intended to provide basic information so that a third-party reviewer can understand the basis for an agency's finding or proposed decision.

Section 800.12

This section on emergency situations contains some minor changes from the process under the regulations to be superseded, but generally follows the existing approach.

Section 800.12(a)

This section encourages Federal agencies to develop procedures describing how the Federal agency will take into account historic properties during certain emergency operations,

including imminent threats to life or property. The nature of the consultation required in developing such procedures will vary, depending upon the extent of actions covered by the procedures. The procedures must be approved by the Council if they are to substitute for Subpart B.

Section 800.12(b)

If there are no agency procedures for taking historic properties into account during emergencies, then the Federal agency may either follow a previously-developed Programmatic Agreement or notify the Council, SHPO/THPO and, where appropriate, an Indian tribe or native Hawaiian organization concerned with potentially affected resources. If possible, the Federal agency should provide these parties 7 days to comment.

Section 800.12(c)

This section permits a local government that has assumed section 106 responsibilities to use the provisions of § 800.12(a) and (b). However, if the Council or an SHPO/THPO objects, the local government must follow the normal section 106 process.

Section 800.12(d)

A Federal agency may use the provisions in § 800.12 only for 30 days after an emergency or disaster has been declared, unless an extension is sought.

Section 800.13

This section follows closely the process under the regulations to be superseded for dealing with resources discovered after Section 106 review has been completed.

Section 800.13(a)

This section emphasizes the utility of developing Programmatic Agreements to deal with discoveries of historic properties which may occur during implementation of an undertaking. If there is no Programmatic Agreement to deal with discoveries, and the Agency Official determines that other historic properties are likely to be discovered, then a plan for how discoveries will be addressed must be included in a no adverse effect finding or a Memorandum of Agreement.

Section 800.13(b)(1)

This section states the procedures that must be followed when construction has not yet occurred or an undertaking has not yet been approved. Because a Federal agency has more flexibility at this stage, adherence to the consultative

process as set forth in § 800.6 is appropriate.

Section 800.13(b)(2)

This section provides that where an archeological site has been discovered and where the Agency Official, SHPO/THPO and any appropriate Indian tribe or Native Hawaiian organization agree that it is of value solely for the data that it contains, the Agency Official can comply with the Archeological and Historic Preservation Act instead of the procedures in this subpart.

Section 800.13(b)(3)

This section sets forth the procedures that must be followed when the undertaking has been approved and construction has commenced. Development of actions to resolve adverse effects and notification to the SHPO/THPO and the council within 48 hours of the discovery are required. Comments from those parties are encouraged and the agency must report the actions it ended up taking to deal with the discovery.

Section 800.13(c)

This section allows an agency to make an expedited field judgment regarding eligibility of properties discovered during construction.

Section 800.13(d)

This new section requires an agency to comply with tribal procedures when a discovery is on tribal land and obtain concurrence of the tribe, unless it has previously developed a process under § 800.13(a).

*Subpart C—Program Alternatives**Section 800.14*

This section lays out a variety of alternative methods for Federal agencies to meet their Section 106 obligations. While some are based on existing techniques in the regulations to be superseded, a number are newly-introduced to allow agencies to tailor the Section 106 process to their needs.

Section 800.14(a)

Alternate procedures are a major streamlining measure that allows tailoring of the Section 106 process to Agency programs and decisionmaking processes. The procedures would substitute in whole or in part for the Council's section 106 regulations. As procedures, they would include formal Agency regulations, but would also include departmental or Agency procedures that do not go through the formal rulemaking process. Procedures must be developed in consultation with various parties as set forth in the

regulations. The public must have an opportunity to comment on Alternate procedures. If the Council determines that they are consistent with its regulations, the alternate procedures may substitute for the Council's regulations. In reviewing alternate procedures for consistency, the Council will not require detailed adherence to every specific step of the process found under the Council's regulations. The Council, however, will look for procedures that afford historic properties consideration equivalent to that afforded by the Council's regulations and that meet the requirements of section 110(a)(2)(E) of the Act. If an Indian tribe has substituted its procedures for the Council's regulations pursuant to section 101(d)(5) of the NHPA, then the Federal agency must follow the tribe's substitute regulations for undertakings on tribal lands.

Section 800.14(b)

This section is intended to retain the concept of Programmatic Agreements as in the regulations to be superseded, but to add more clarity about their use and the processes for creating them. The circumstances under which a Programmatic Agreement is appropriate are specified. The section places Programmatic Agreements into two general categories: Those covering agency programs and those covering complex or multiple undertakings. The section on Agency programs makes clear that the President of NCSHPO must sign a nationwide agreement when NCSHPO has participated in the consultation. If a Programmatic Agreement concerns a particular region, then the signature of the affected SHPSs/THPOs is required. An individual SHPO/THPO can terminate its participation in a regional Programmatic Agreement, but the agreement will remain in effect for the other states in the region. Only NCSHPO can terminate a nationwide Programmatic Agreement on behalf of the individual SHPOs. Language is included to recognize tribal sovereignty while providing flexibility to Federal agencies and tribes when developing Programmatic Agreements. While it does not prohibit the other parties from executing a Programmatic Agreement, the language does limit the effect of the agreement to non-tribal lands unless the tribe executes it. However, the language also authorizes multiple Indian tribes to designate a representative tribe or tribal organization to participate in consultation and sign a Programmatic Agreement on their behalf. Requirements for public involvement and notice are included. The section on

complex or multiple undertakings ties back to § 800.6 for the process of creating such programmatic agreements.

Section 800.14(c)

Exemptions are intended to remove from section 106 compliance those undertakings that have foreseeable effects on historic properties which are likely to be minimal. Section 214 of the NHPA gives the Council the authority to allow for such exemptions. This section sets forth the criteria, drawn from the statute, for exemptions and a process for obtaining (and terminating) an exemption.

Section 800.14(d)

Standard treatments provide a streamlined process by which the Council can establish certain acceptable practices for dealing with a category of undertakings, effects, historic properties, or treatment options. A standard treatment may modify the application of the normal Section 106 process under certain circumstances or simplify the steps or requirements of the regulations. This section sets forth the process for establishing a standard treatment and terminating it.

Section 800.14(e)

Program comments are intended to give the Council the flexibility to issue comments on a Federal program or class of undertakings rather than comment on such undertakings on a case-by-case basis. This section sets forth the process for issuing such comments and withdrawing them. The Federal agency is obligated to consider, but not necessarily follow, the Council's comments. If it does not, the Council may withdraw the comment, in which case the agency continues to comply with section 106 on a case-by-case basis.

Section 800.14(f)

The requirement for consultation program alternatives with Indian tribes and Native Hawaiian organizations is provided for in this section. It is an overlay on each of the Federal program alternatives set forth in §§ 800.14(a)–(e). It provides for government-to-government consultation with Indian tribes. The Council and the Federal agency will consider the views of the Indian tribes and Native Hawaiian organizations in making a decision on a program alternative.

Section 800.15. Tribal, State and Local Program Alternatives

This section is presently reserved for future use. The Council will proceed with the review of tribal applications for substitution of tribal regulations for the

Council's section 106 regulations on tribal lands, pursuant to section 101(d)(5) of the Act, on the basis of informal procedures. With regard to State agreements, the Council will keep in effect any currently valid State agreements until revised procedures for State agreements take effect or until the agreement is otherwise terminated.

Section 800.16 Definitions

This section includes new definitions to respond to identified needs for clarification and to reflect statutory amendments.

The definition of "Agency" was added for ease of reference. It tracks the statutory definition in the NHPA.

The definition of "approval of the expenditure of funds" was added to clarify the intent of this statutory language as it appears in section 106 of the NHPA. This definition addresses the timing of section 106 compliance. A Federal agency must take into account the effects of its actions and provide the Council a reasonable opportunity to comment before the Agency decides to authorize funds, not just before the release of those funds. The intent of this provision is to emphasize the necessitate for compliance with section 106 early in the decision making process.

The definition of "area of potential effects" has been clarified by adding the second sentence which acknowledges that the determination of the area potential effects is often subjective and depends on the nature and scale of the undertaking and the associated effects.

The definition of "comment" was added to make it clear that the term referred to the formal comments of the Council members.

The definition of "consultation" was added to describe the nature and goals of this critical aspect of the section 106 review process.

"Day" was added to clarify the running of time periods.

"Effect" was added to the definition section. Even though the "no effect" step has been eliminated in the final rule, the concept of an undertaking's effect is still a part of the "historic properties affected" determination.

"Foreclosure" is a term that has always been a part of the section 106 process, but has not been defined in the regulations. The terms was added to the definition section to describe the finding that is made by the Council when an Agency action precludes the Council from its reasonable opportunity to comment on an undertaking.

"Head of the Agency" was added in light of the 1992 amendments in section 110(1) that require that the head of an

Agency document decisions where a Memorandum of Agreement has not been reached for an undertaking.

"Historic property" has been expanded to include properties of traditional religious and cultural importance in accordance with section 101(d)(6)(A) of the NHPA as amended in 1992.

"Indian tribe" has been redefined exactly as in section 301(4) of the statute.

"Native Hawaiian organization" is defined exactly as in section 301(17) of the statute.

"Tribal Historic Preservation Officer" is intended to include the tribal official who has formally assumed the SHPO's responsibilities. It also includes, for ease of reference, the designated representative of a tribe that has not assumed SHPO responsibilities when an undertaking occurs on or affects historic properties on its tribal lands; this inclusive interpretation of THPO was added so that it would be clear that whenever an Agency undertaking is on or affects historic properties on tribal lands, the tribe's approval and signature on an agreement is required, unless they specifically waive their rights.

"Tribal lands" is defined exactly as in section 301(14) of the statute.

"Undertaking" is defined exactly as in section 301(7) of the statute. The Agency Official is responsible, in accordance with § 800.3(a), for making the determination as to whether a proposed Federal action is an undertaking. As appropriate, an agency should examine the nature of its Federal involvement taking into consideration factors such as the degree of Federal agency control or discretion; the type of Federal involvement or link to the action; and whether or not the action could move forward without Federal involvement. An agency should seek the advice of the Council when uncertain about whether or not its action falls within the definition of an undertaking. The pre-existing regulatory definition of undertaking included new and continuing projects, activities, or programs and any of their elements not previously considered under section 106. It is intended that the new definition includes such aspects of a project, activity, or program as undertakings.

Appendix A. Criteria for Council Involvement in Reviewing Individual Section 106 Cases

This appendix sets forth the criteria that will guide Council decisions to enter certain section 106 cases, as provided in the new regulations. As § 800.2(b)(1) states, the Council will

document that the criteria have been met and notify the parties to the section 106 process as process as required. Council involvement in section 106 cases is not automatic once a criterion has been met. The Council retains discretion as to whether or not to enter such a case. Likewise, it is not essential that all criteria be met. The point of the criteria is to ensure that the Council has made a thoughtful decision to enter the section 106 process and to give agencies, SHPOs/THPOs and other section 106 participants a clear understanding of the kind of cases that warrant Council involvement.

VIII. Impact Analysis

The Regulatory Flexibility Act

The Council certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Although some comment on the rule as proposed questioned the validity of such certification, the rule in its proposed and final versions imposes mandatory responsibilities on only Federal agencies. As set forth in section 106 of the NHPA, the duties to take into account the effect of an undertaking on historic resources and to afford the Council a reasonable opportunity to comment on that undertaking are Federal agency duties. Indirect effects on small entities, if any, created in the course of a Federal agency's compliance with section 106 of the NHPA, must be considered and evaluated by that Federal agency.

The Paperwork Reduction Act

The final regulations do not impose reporting or recordkeeping requirements or the collection of information as defined in the Paperwork Reduction Act.

The National Environmental Policy Act

In accordance with 36 CFR part 805, the Council initiated the NEPA compliance process for the Council's regulations implementing section 106 of the NHPA prior to publication of the draft regulations in the **Federal Register** on September 13, 1996. On August 12, 1997, through a notice of availability on the **Federal Register**, the Council sought public comment on its Environmental Assessment and preliminary Finding of No Significant Impact. The Council has considered such comments, and has confirmed its finding of no significant impact on the human environment. A notice of availability of the Environmental Assessment and Finding of No Significant Impact has been published on the **Federal Register**.

Executive Orders 12866 and 12875

The Council is exempt from compliance with Executive Order 12866 pursuant to implementing guidance issued by the Office of Management and Budget's Office of Information and Regulatory Affairs in a memorandum dated October 12, 1993. The Council also is exempt from the documentation requirements of Executive Order 12875 pursuant to implementing guidance issued by the same OMB office in a memorandum dated January 11, 1994. Although exempt, the Council has adhered to the principles in both orders by involving and consulting with State, local, and tribal entities, members of the public, and industry groups in the development of these regulations and throughout the rulemaking process, as discussed above in the Background section. The regulations do not mandate State, local, or tribal governments to participate in the Section 106 process. Instead, State, local, and tribal governments may decline to participate. State Historic Preservation Officers do advise and assist Federal agencies, as appropriate, as part of their duties under section 101(b)(3)(E) of the NHPA, as a condition of their Federal grant assistance. In addition, in accordance with Executive Order 12875, the regulations include several flexible approaches to consideration of historic properties in Federal agency decision making. The regulations promote flexibility and cost effective compliance by providing for alternate procedures, categorical exemptions, standard treatments, program comments, and programmatic agreements.

The Unfunded Mandates Reform Act of 1995

The final regulations implementing section 106 of the NHPA do not impose annual costs of \$100 million or more, will not significantly or uniquely affect small governments, and are not a significant Federal intergovernmental mandate. The Council thus has no obligations under sections 202, 203, 204 and 205 of the Unfunded Mandates Reform Act.

Executive Order 12898

The final regulations implementing section 106 of the NHPA do not cause adverse human health or environmental effects, but, instead, seek to avoid adverse effects on historic properties throughout the United States. The participation and consultation process established by these regulations seeks to ensure public participation—including by minority and low-income populations and communities—by those

whose cultural heritage, or whose interest in historic properties, may be affected by proposed Federal undertakings. The section 106 process is a means of access for minority and low-income populations to participate in Federal decisions or actions that may affect such resources as historically significant neighborhoods, buildings, and traditional cultural properties. The Council considers environmental justice issues in reviewing analysis of alternatives and mitigation options particularly when section 106 compliance is coordinated with NEPA compliance. Guidance and training is being developed to assist public understanding and use of these regulations.

Memorandum Concerning Government-to-Government Relations With Native American Tribal Governments

The Council has fully complied with this Memorandum. A Native American representative served on the Council and was a member of the Council's Regulations Task Force. The regulations enhance the opportunity for Native American involvement in the section 106 process and clarify the obligation of Federal agencies to consult with Native Americans.

Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The council will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective June 17, 1999.

List of Subjects in 36 CFR Part 800

Administrative practice and procedure, Historic preservation, Indians, Inter-governmental relations.

For the reasons discussed in the preamble, the Advisory Council on Historic Preservation amends Title 36, Chapter VIII by revising part 800 to read as follows:

PART 800—PROTECTION OF HISTORIC PROPERTIES

Subpart A—Purposes and Participants

Sec.

800.1 Purposes.

800.2 Participants in the section 106 process.

Subpart B—The Section 106 Process

800.3 Initiation of the section 106 process.

800.4 Identification of historic properties.

800.5 Assessment of adverse effects.

800.6 Resolution of adverse effects.

800.7 Failure to resolve adverse effects.

800.8 Coordination with the National Environmental Policy Act.

800.9 Council review of section 106 compliance.

800.10 Special requirements for protecting National Historic Landmarks.

800.11 Documentation standards.

800.12 Emergency situations.

800.13 Post-review discoveries.

Subpart C—Program Alternatives

800.14 Federal agency program alternatives.

800.15 Tribal, State and Local Program Alternatives. [Reserved]

800.16 Definitions.

Appendix A—Criteria for Council Involvement in Reviewing Individual Section 106 Cases

Authority: 16 U.S.C. 470s.

Subpart A—Purposes and Participants

§ 800.1 Purposes.

(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the Agency Official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) *Relation to other provisions of the Act.* Section 106 is related to other provisions of the Act designed to further the national policy of historic preservation. References to those provisions are included in this part of identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing

regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) *Timing.* The Agency Official must complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." This does not prohibit Agency Official from conducting or authorizing nondestructive project planning activities before completing compliance with Section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The Agency Official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

§ 800.2 Participants in section 106 process.

(a) *Agency Official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an Agency Official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The Agency Official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the Agency Official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The Agency Official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the Act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency,

which shall identify the appropriate official to serve as the Agency Official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.* Consistent with applicable conflict of interest laws, the Agency Official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The Agency Official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the Agency Official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The Agency Official shall involve the consulting parties described in § 800.2(c) in findings and determinations made during the section 106 process. The Agency Official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation. The Council encourages the Agency Official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) *Council.* The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to Agency Officials on individual undertakings and programs that affect historic properties.

(1) *Council entry into the section 106 process.* When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the Act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) *Council assistance.* Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this

part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) *Consulting parties.* The following parties have consultative roles in the section 106 process.

(1) *State Historic Preservation Officer.*

(i) The State Historic Preservation Officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the Act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) *Tribal Historic Preservation Officer.*

(i) The Tribal Historic Preservation Officer (THPO) appointed or designated in accordance with the Act is the official representative of an Indian tribe for the purposes of section 106. If an Indian tribe has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the Act, the Agency Official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(ii) If an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the Act, the Agency Official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. For the purposes of subpart B of this part, such tribal representative shall be included in the term "THPO."

(3) *Indian tribes and Native Hawaiian organizations.* Section 101(d)(6)(B) of the Act requires the Agency Official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(i) The Agency Official shall ensure that consultation in the section 106

process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the Agency Official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(ii) The Federal government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part is intended to alter, amend, repeal, interpret or modify tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(iii) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal government and Indian tribes. The Agency Official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(iv) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the Act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(v) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an Agency Official that specifies how they will carry out

responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The Agency Official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(vi) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the Act may notify the Agency Official in writing that it is waiving its rights under § 800.6(c)(1) to execute a Memorandum of Agreement.

(4) *Representatives of local governments.* A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the Agency Official for purposes of section 106.

(5) *Applicants for Federal assistance, permits, licenses and other approvals.* An applicant for Federal assistance or for a Federal permit, license or other approval is entitled to participate as a consulting party as defined in this part. The Agency Official may authorize an applicant to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the Agency Official. The Agency Official shall notify the SHPO/THPO and other consulting parties when an applicant is so authorized.

(6) *Additional consulting parties.* Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) *The public.*—(1) *Nature of involvement.* The views of the public are essential to informed Federal decisionmaking in the section 106 process. The Agency Official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely

interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) *Providing notice and information.* The Agency Official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the Agency Official to consider in decisionmaking.

(3) *Use of agency procedures.* The Agency Official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

Subpart B—The Section 106 Process

§ 800.3 Initiation of the section 106 process.

(a) *Establish undertaking.* The Agency Official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) *No potential to cause effects.* If the undertaking does not have the potential to cause effects on historic properties, the Agency Official has no further obligations under section 106 or this part.

(2) *Program alternatives.* If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a Programmatic Agreement in existence before the effective date of these regulations, the Agency Official shall follow the program alternative.

(b) *Coordinate with other reviews.* The Agency Official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archaeological Resources Protection Act and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the Agency Official may use information

developed for other reviews under Federal, State or tribal law to meet the requirements of section 106.

(c) *Identify the appropriate SHPO and/or THPO.* As part of its initial planning, the Agency Official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The Agency Official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The Agency Official shall then initiate consultation with the appropriate Officer or Officers.

(1) *Tribal assumption of SHPO responsibilities.* Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the Act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the Act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) *Undertakings involving more than one State.* If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) *Conducting consultation.* The Agency Official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) *Failure of the SHPO/THPO to respond.* If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the Agency Official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the section 106 process, the Agency Official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) *Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition

to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the Agency Official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) *Plan to involve the public.* In consultation with the SHPO/THPO, the Agency Official shall plan for involving the public in the section 106 process. The Agency Official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) *Identify other consulting parties.* In consultation with the SHPO/THPO, the Agency Official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The Agency Official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) *Involving local governments and applicants.* The Agency Official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) *Involving Indian tribes and Native Hawaiian organizations.* The Agency Official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) *Requests to be consulting parties.* The Agency Official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) *Expediting consultation.* A consultation by the Agency Official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3–800.6 where the Agency Official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

§ 800.4 Identification of historic properties.

(a) *Determine scope of identification efforts.* The Agency Official shall consult with the SHPO/THPO to:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The Agency Official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) *Identify historic properties.* Based on the information gathered under § 800.4(a), and in consultation with the SHPO/THPO and any Indian tribe or native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the Agency Official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) *Level of effort.* The Agency Official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The Agency Official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's Standards and Guidelines for Identification provide guidance on this subject. The Agency Official should also consider other applicable professional, State, tribal and local laws, standards and guidelines. The Agency Official

shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) *Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the Agency Official may use a phased process to conduct identification and evaluation efforts. The Agency Official may also defer final identification and evaluation of historic properties if it is specifically provided for in a Memorandum of Agreement executed pursuant to § 800.6, a Programmatic Agreement executed pursuant to § 800.14(b), or the documents used by an Agency Official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the Agency Official shall proceed with the identification and evaluation of historic properties in accordance with §§ 800.4(b)(1) and (c).

(c) *Evaluate historic significance.*—(1) *Apply National Register Criteria.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's Standards and Guidelines for Evaluation, the Agency Official shall apply the National Register Criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the Agency Official to reevaluate properties previously determined eligible or ineligible. The Agency Official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the Agency Official determines any of the National Register

Criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the Agency Official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the Agency Official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the Agency Official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the Agency Official to obtain a determination of eligibility.

(d) *Results of identification and evaluation.*—(1) *No historic properties affected.* If the Agency Official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the Agency Official shall provide documentation of this finding as set forth in § 800.11(d) to the SHPO/THPO. The Agency Official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking. If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the Agency Official's responsibilities under section 106 are fulfilled.

(2) *Historic properties affected.* If the Agency Official finds that there are historic properties which may be affected by the undertaking or the SHPO/THPO or the Council objects to the Agency Official's finding under § 800.4(d)(1), the Agency Official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

§ 800.5 Assessment of adverse effects.

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the Agency Official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The Agency Official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, and of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) *Examples of adverse effects.* Adverse effects on historic properties include, but are not limited to:

- (i) Physical destruction of or damage to all or part of the property;
- (ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines;
- (iii) Removal of the property from its historic location;
- (iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;
- (v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;
- (vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and
- (vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the Agency Official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) *Finding of no adverse effect.* The Agency Official, in consultation with

the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of § 800.5(a)(1) or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) *Consulting party review.* If the Agency Official proposes a finding of no adverse effect, the Agency Official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) *Agreement with finding.* Unless the Council is reviewing the finding pursuant to § 800.5(c)(3), the Agency Official may proceed if the SHPO/THPO agrees with the finding. The Agency Official shall carry out the undertaking in accordance with § 800.5(d)(1). Failure of the SHPO/THPO to respond within 30 days from receipt of the finding shall be considered agreement of the SHPO/THPO with the finding.

(2) *Disagreement with finding.* (i) If the SHPO/THPO or any consulting party disagrees within the 30-day review period, it shall specify the reasons for disagreeing with the finding. The Agency Official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to § 800.5(c)(3).

(ii) The Agency Official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the Agency Official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30-day review period specify the reasons for disagreeing with the finding and request the Council to review the finding pursuant to § 800.5(c)(3).

(iii) If the Council on its own initiative so requests within the 30-day review period, the Agency Official shall submit the finding, along with the documentation specified in § 800.11(e), for review pursuant to § 800.5(c)(3). A Council decision to make such a request shall be guided by the criteria in appendix A to this part.

(3) *Council review of findings.* When a finding is submitted to the Council pursuant to § 800.5(c)(2), the Agency Official shall include the documentation specified in § 800.11(e). The Council shall review the finding and notify the

Agency Official of its determination as to whether the adverse effect criteria have been correctly applied within 15 days of receiving the documented finding from the Agency Official. The Council shall specify the basis for its determination. The Agency Official shall proceed in accordance with the Council's determination. If the Council does not respond within 15 days of the receipt of the finding, the Agency Official may assume concurrence with the Agency Official's findings and proceed accordingly.

(d) *Results of assessment.*—(1) *No adverse effect.* The Agency Official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the Agency Official's responsibilities under section 106 and this part. If the Agency Official will not conduct the undertaking as proposed in the finding, the Agency Official shall reopen consultation under § 800.5(a).

(2) *Adverse effect.* If an adverse effect is found, the Agency Official shall consult further to resolve the adverse effect pursuant to § 800.6.

§ 800.6 Resolution of adverse effects.

(a) *Continue consultation.* The Agency Official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The Agency Official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The Agency Official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A Programmatic Agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the Agency Official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide

written notice to the Agency Official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with § 800.6(b)(2). (iv) If the Council does not join the consultation, the Agency Official shall proceed with consultation in accordance with § 800.6(b)(1).

(2) *Involve consulting parties.* In addition to the consulting parties identified under § 800.3(f), the Agency Official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The Agency Official shall invite any individual or organization that will assume a specific role or responsibility in a Memorandum of Agreement to participate as a consulting party.

(3) *Provide documentation.* The Agency Official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The Agency Official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The Agency Official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The Agency Official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The Agency Official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the Section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the Act and other authorities may limit the disclosure of information under §§ 800.6(a)(3) and (4). If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the Agency Official believes that there are other reasons to withhold information,

the Agency Official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects*—(1) *Resolution without the Council.* (i) The Agency Official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The Agency Official may use standard treatments established by the Council under § 800.14(d) as a basis for a Memorandum of Agreement.

(iii) If the Council decides to join the consultation, the Agency Official shall follow § 800.6(b)(2).

(iv) If the Agency Official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a Memorandum of Agreement. The Agency Official must submit a copy of the executed Memorandum of Agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the Agency Official, and the SHPO/THPO fail to agree on the terms of a Memorandum of Agreement, the Agency Official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the Agency Official shall proceed in accordance with § 800.6(b)(2). If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the Agency Official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the Agency Official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a Memorandum of Agreement.

(c) *Memorandum of Agreement.* A Memorandum of Agreement executed and implemented pursuant to this section evidences the Agency Official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. A Memorandum of Agreement executed pursuant to § 800.6(b)(1) that is filed with the Council shall be considered to be an agreement with the Council for the purposes of Section 110(1) of the Act. The Agency Official shall ensure that

the undertaking is carried out in accordance with the Memorandum of Agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The Agency Official and the SHPO/THPO are the signatories to a Memorandum of Agreement executed pursuant to § 800.6(b)(1).

(ii) The Agency Official, the SHPO/THPO, and the Council are the signatories to a Memorandum of Agreement executed pursuant to § 800.6(b)(2).

(iii) The Agency Official and the Council are signatories to a Memorandum of Agreement executed pursuant to § 800.7(a)(2).

(2) *Invited signatories.* (i) The Agency Official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a Memorandum of Agreement concerning such properties.

(ii) The signatories should invite any party that assumes a responsibility under a Memorandum of Agreement to be a signatory.

(iii) The refusal of any party invited to become a signatory to a Memorandum of Agreement pursuant to § 800.6(c)(2)(i) or (ii) does not invalidate the Memorandum of Agreement.

(3) *Concurrence by others.* The Agency Official may invite all consulting parties to concur in the Memorandum of Agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the Memorandum of Agreement does not invalidate the Memorandum of Agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a Memorandum of Agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A Memorandum of Agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a Memorandum of Agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a Memorandum of Agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the Agency Official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a Memorandum of Agreement cannot be carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The Agency Official shall either execute a Memorandum of Agreement with signatories under § 800.6(c)(1) or request the comments of the council under § 800.7(a).

(9) *Copies.* The Agency Official shall provide each consulting party with a copy of any Memorandum of Agreement executed pursuant to this subpart.

§ 800.7 Failure to resolve adverse effects.

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the Agency Official the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the Agency Official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to § 800.7(c) and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the Agency Official and the Council may execute a Memorandum of Agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to § 800.7(c).

(4) If the Council terminates consultation, the Council shall notify the Agency Official, the agency's Federal Preservation Officer and all consulting parties of the termination and comment under § 800.7(c). The Council may consult with the agency's Federal Preservation Officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a Memorandum of Agreement will be executed. The Council shall provide them to the Agency Official when it executes the Memorandum of Agreement.

(c) *Comments by the Council.*—(1) *Preparation.* The Council shall provide

an opportunity for the Agency Official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the Agency Official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under §§ 800.7(a)(1) or (3) or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or § 800.7(a)(4), unless otherwise agreed to by the Agency Official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the Agency Official, the agency's Federal Preservation Officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(1) of the Act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

§ 800.8 Coordination with the National Environmental Policy Act.

(a) *General principles.*—(1) *Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their Section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an

Environmental Impact Statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party rules.* SHPO/THPOs, Indian tribes and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency Officials should ensure that preparation of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) and an EIS and Record of Decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the Agency Official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the Agency Official shall proceed with Section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An Agency Official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the Agency Official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with section 106.* During preparation of the EA or Draft EIS (DEIS) the Agency Official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the Agency Official's consideration of project alternatives in the NEPA process and

the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and

(v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents.* (i) The Agency Official shall submit the EA, DEIS or EIS to the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the Agency Official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the Agency Official that preparation of the EA, DEIS or EIS has not met the standards set forth in § 800.8(c)(1) or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS or EIS is inadequate. If the Agency Official receives such an objection, the Agency Official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the Agency Official's referral of an objection under § 800.8(c)(2)(ii), the Council shall notify the Agency Official either that it agrees with the objection, in which case the Agency Official shall enter into consultation in accordance with § 800.6(b)(2) or seek Council comments in accordance with § 800.7(a), or that it disagrees with the objection, in which case the Agency Official shall continue its compliance with this section. Failure of the Council to respond within the 30 day period shall be considered disagreement with the objection.

(4) *Approval of the undertaking.* If the Agency Official has found during the preparation of the EA, DEIS or EIS that the effects of the undertaking on historic properties are adverse, the Agency Official shall specify in the FONSI or the ROD the proposed measures to avoid, minimize or mitigate such effects and ensure that the approval of the undertaking is conditioned accordingly. The Agency Official's responsibilities under Section 106 and the procedures in this subpart shall then be satisfied when either the proposed measures have been adopted through a binding commitment on the agency, the applicant or other entities, as appropriate, or the Council has commented and received the response to such comments under § 800.7. Where the NEPA process results in a FONSI, the Agency Official must adopt such a binding commitment through a Memorandum of Agreement drafted in compliance with § 800.6(c). Where the NEPA process results in an EIS, the binding commitment does not have to be in the form of a Memorandum of Agreement drafted in compliance with § 800.6(c).

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the Agency Official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to § 800.8(c)(4)) are carried out, the Agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.

§ 800.9 Council review of Section 106 compliance.

(a) *Assessment of Agency Official compliance for individual undertakings.* The Council may provide to the Agency Official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the Agency Official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The Agency Official shall consider the views of the Council in reaching a decision on the matter in question.

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an Agency Official has failed to

complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the Agency Official and the agency's Federal Preservation Officer and allow 30 days for the Agency Official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the Agency Official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) *Intentional adverse effects by applicants.*—(1) *Agency responsibility.* Section 110(k) of the Act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the Act governs its implementation.

(2) *Consultation with the Council.* When an Agency Official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the Agency Official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the Agency Official's notification, unless otherwise agreed to by the Agency Official, the Council shall provide the Agency Official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The Agency Official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

(3) *Compliance with Section 106.* If an Agency Official, after consulting with the Council, determines to grant the assistance, the Agency Official shall comply with §§ 800.3–800.6 to take into account the effects of the undertaking on any historic properties.

(d) *Evaluation of Section 106 operations.* The Council may evaluate the operation of the Section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the Act.

(1) *Information from participants.* Section 203 of the Act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the Section 106 process. The Agency Official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the Section 106 process.

(2) *Improving the operation of Section 106.* Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an Agency Official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the procedures in this part, the Council may participate in individual case reviews in a manner and for a period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the Act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

§ 800.10 Special requirements for protecting National Historic Landmarks.

(a) *Statutory requirement.* Section 110(f) of the Act requires that the Agency Official, to the maximum extent possible undertake such planning and

actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertaking, the Council shall use the process set forth in §§ 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) *Resolution of adverse effects.* The Agency Official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.

(c) *Involvement of the Secretary.* The Agency Official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the Act to assist in the consultation.

(d) *Report of outcome.* When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any Memoranda of Agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

§ 800.11 Documentation standards.

(a) *Adequacy of documentation.* The Agency Official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. When an Agency Official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the Agency Official and specify the information needed to meet the standard. At the request of the Agency Official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the Agency Official and the consulting parties.

(b) *Format.* The Agency Official may use documentation prepared to comply with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) *Confidentiality*—(1) *Authority to withhold information.* Section 304 of the Act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the Act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to the criteria above, the Secretary, in consultation with such Federal agency head or official, shall determine whom may have access to the information for the purpose of carrying out the Act.

(2) *Consultation with the Council.* When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

(3) *Other authorities affecting confidentiality.* Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the Section 106 process and may authorize the Agency Official to protect the privacy of non-governmental applicants.

(d) *Finding of no historic properties affected.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;

(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and

(3) The basis for determining that no historic properties are present or affected.

(e) *Finding of no adverse effect or adverse effect.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including

photographs, maps, and drawings, as necessary;

(2) A description of the steps taken to identify historic properties;

(3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;

(4) A description of the undertaking's effects on historic properties.

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

(f) *Memorandum of Agreement.* When a Memorandum of Agreement is filed with the Council, the documentation shall include any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

(g) *Requests for comment without a Memorandum of Agreement.* Documentation shall include:

(1) A description and evaluation of any alternatives or mitigation measures that the Agency Official proposes to resolve the undertaking's adverse effects;

(2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;

(3) Copies or summaries of any views submitted to the Agency Official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and

(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).

§ 800.12 Emergency situations.

(a) *Agency procedures.* The Agency Official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government or the governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities

during any disaster or emergency in lieu of §§ 800.3 through 800.6.

(b) *Alternatives to agency procedures.* In the event an Agency Official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government or the governor of a State or another immediate threat to life or property, and the agency has not developed procedures pursuant to § 800.12(a), the Agency Official may comply with section 106 by:

(1) Following a Programmatic Agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or

(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the Agency Official determines that circumstances do not permit seven days for comment, the Agency Official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) *Local governments responsible for section 106 compliance.* When a local government official serves as the Agency Official for section 106 compliance, § 800.12 (a) and (b) also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the Agency Official shall comply with §§ 800.3 through 800.6.

(d) *Applicability.* This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

§ 800.13 Post-review discoveries.

(a) *Planning for subsequent discoveries.*—(1) *Using a Programmatic Agreement.* An Agency Official may develop a Programmatic Agreement pursuant to § 800.14(b) to govern the actions to be taken when historic

properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the Agency Official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no Programmatic Agreement has been developed pursuant to § 800.13(a)(1), the Agency Official shall include in any finding of no adverse effect or Memorandum of Agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the Agency Official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the Agency Official has completed the section 106 process without establishing a process under § 800.13(a), the Agency Official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the Agency Official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the Agency Official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archaeological data, the Agency Official may comply with the Archaeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the Agency Official has approved the undertaking and construction has commenced, determine actions that the Agency Official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the actions proposed by the Agency Official to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification and the Agency Official shall take into account their recommendations and carry out

appropriate actions. The Agency Official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) *Eligibility of properties.* The Agency Official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of Section 106. The Agency Official shall specify the National Register Criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the Agency Official has completed the section 106 process without establishing a process under § 800.13(a) and construction has commenced, the Agency Official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

Subpart C—Program Alternatives

§ 800.14 Federal agency program alternatives.

(a) *Alternate procedures.* An Agency Official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the Act.

(1) *Development of procedures.* The Agency Official shall consult with the Council, the National Conference of State Historic Preservation Officers or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in § 800.14(f), in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the **Federal Register** and take other appropriate steps to seek public input during the development of alternate procedures.

(2) *Council review.* The Agency Official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the Agency Official and the Agency Official may adopt them as final alternate procedures.

(3) *Notice.* The Agency Official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the **Federal Register**.

(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the Act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic Agreements.* The Council and the Agency Official may negotiate a Programmatic Agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of Programmatic Agreements.* A Programmatic Agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing Programmatic Agreements for agency programs—(i) Consultation.* The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCHSPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the Programmatic Agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Agency Official shall also follow § 800.14(f).

(ii) *Public Participation.* The Agency Official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The Agency Official shall consider the nature of the program and its likely effects on historic properties and take

steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The Programmatic Agreement shall take effect when executed by the Council, the Agency Official and the appropriate SHPOs/THPOs when the Programmatic Agreement concerns a specific region or the President of NCSHPO when NCSHPO has participated in the consultation. A Programmatic Agreement shall take effect on tribal lands only when the THPO, Indian tribe or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved Programmatic Agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the President of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional Programmatic Agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the Act and the SHPO is signatory to Programmatic Agreement, the THPO assumes the role of a signatory, including the right to terminate a regional Programmatic Agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The Agency Official shall notify the parties with which it has consulted that a Programmatic Agreement has been executed under this subsection, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) *Terms not carried out or termination.* If the Council determines that the terms of a Programmatic Agreement are not being carried out, or if such an agreement is terminated, the Agency Official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) *Developing Programmatic Agreements for complex or multiple undertakings.* Consultation to develop a Programmatic Agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the Agency Official shall comply with the

provisions of subpart B of this part for each individual undertaking.

(c) *Exempted categories.—(1) Criteria for establishing.* An Agency Official may propose a program or category of agency undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purpose of the Act.

(2) *Public participation.* The Agency Official shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The Agency Official shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Agency Official shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the Agency Official set forth in § 800.14(f).

(5) *Council review of proposed exemptions.* The Council shall review a request for an exemption that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of § 800.14(c)(1) have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the public. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt. The decision shall be based on the consistency of the exemption with the purposes of the Act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the Act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category

shall require no further review pursuant to subpart B of this part, unless the Agency Official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the Agency Official or when the Council determines that the exemption no longer meets the criteria of § 800.14(c)(1). The Council shall notify the Agency Official 30 days before termination becomes effective.

(8) *Notice.* The Agency Official shall publish notice of any approved exemption in the **Federal Register**.

(d) *Standard treatments.—(1) Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category or effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the **Federal Register**.

(2) *Public participation.* The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interests. Where an Agency Official has proposed a standard treatment, the Council may request the Agency Official to arrange for public involvement.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the Agency Official set forth in § 800.14(f).

(5) *Termination.* The Council may terminate a standard treatment by publication of notice in the **Federal Register** 30 days before the termination takes effect.

(e) *Program comments.* An Agency Official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.6. The

Council may provide program comments at its own initiative.

(1) *Agency request.* The Agency Official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the Agency Official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The Agency Official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standard in subpart A of this part. The Agency Official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the Agency Official set forth in § 800.14(f).

(5) *Council action.* Unless the Council requests additional documentation, notifies the Agency Official that it will decline to comment, or obtains the consent of the Agency Official to extend the period for providing comment, the Council shall comment to the Agency Official within 45 days of the request.

(i) If the Council comments, the Agency Official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the **Federal Register** of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the Agency Official shall continue to comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the Agency Official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.*

Whenever an Agency Official proposes a program alternative pursuant to § 800.14 (a)–(e), the Agency Official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the Agency Official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the Agency Official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them.

(2) *Results of consultation.* The Agency Official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The Agency Official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

§ 800.15 Tribal, State, and Local Program Alternatives. [Reserved]

§ 800.16 Definitions.

(a) *Act* means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470–470w–6.

(b) *Agency* means agency as defined in 5 U.S.C. 551.

(c) *Approval of the expenditure of funds* means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects cause by the undertaking.

(e) *Comment* means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

(g) *Council* means the Advisory Council on historic Preservation or a Council member or employee designated to act for the Council.

(h) *Day or days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an Agency Official that effectively precludes the Council from providing comments which the Agency Official can meaningfully consider prior to the approval of the undertaking.

(k) *Head of the agency* means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(l) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria. The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) *Indian tribe* means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the

United States to Indians because of their status as Indians.

(n) *Local government* means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) *Memorandum of Agreement* means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) *National Historic Landmark* means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(q) *National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) *National Register Criteria* means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s) *Native Hawaiian organization* means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians. *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) *Programmatic Agreement* means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).

(u) *Secretary* means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) *State Historic Preservation Officer (SHPO)* means the official appointed or designated pursuant to section 101(b)(1) of the Act to administer the State

historic preservation program or a representative designated to act for the State Historic Preservation Officer.

(w) *Tribal Historic Preservation Officer (THPO)* means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the Act. For the purposes of subpart B of this part, the term also includes the designated representative of an Indian tribe that has not formally assumed the SHPO's responsibilities when an undertaking occurs on or affects historic properties on the tribal lands of the Indian tribe. (See § 800.2(c)(2)).

(x) *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency.

Appendix A to Part 800—Criteria For Council Involvement in Reviewing Individual Section 106 Cases

Introduction. This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

General Policy. The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

Specific Criteria. The Council is likely to enter the section 106 process at the steps

specified in the revised regulations when an undertaking:

(1) *Has substantial impacts on important historic properties.* This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

(3) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to Section 800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.

Dated: May 7, 1999.

John M. Fowler,

Executive Director.

[FR Doc. 99-12054 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-10-M

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Recommended Approach for Consultation on Recovery of Significant Information From Archaeological Sites

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of guidance.

SUMMARY: In accordance with §§ 800.5 and 800.6 of its revised regulations (36 CFR part 800, "Protection of Historic Properties," published today) implementing Section 106 of the National Historic Preservation Act of 1966, the Advisory Council on Historic Preservation is publishing a recommended approach for consultation by Federal agencies, State Historic Preservation Officers, Tribal Historic Preservation Officers, and others on the effects of Federal, federally-assisted, and federally-licensed or -permitted undertakings on archaeological sites. The Council has determined that issuance of this guidance is consistent with the Council's revised regulations. The full text of the guidance is reproduced under the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: This guidance is effective on June 17, 1999.

ADDRESSES: Those wishing to comment on this guidance should direct such comments to: Executive Director, Advisory Council on Historic Preservation, Old Post Office Building, 1100 Pennsylvania Ave., NW., # 809, Washington, DC 20004; FAX (202) 606-8647; e-mail achp@achp.gov.

FOR FURTHER INFORMATION CONTACT: Ronald D. Anzalone, Assistant to the Executive Director, Advisory Council on Historic Preservation, Old Post Office Building, 1100 Pennsylvania Ave., NW., # 809, Washington, DC 20004, (202) 606-8523.

SUPPLEMENTARY INFORMATION: The full text of the guidance, with the model Memorandum of Agreement, is reproduced below.

Recommended Approach for Consultation on Recovery of Significant Information From Archaeological Sites

Background

Sections 800.5 and 800.6 of the Council's revised regulations, "Protection of Historic Properties" (36 CFR part 800) detail the process by which Federal agencies determine whether their undertakings will adversely affect historic properties, and if they will, how they are to consult to avoid, minimize, or mitigate the adverse

effects in order to meet the requirements of Section 106 to "take into account" the effects of their undertakings on historic properties.

One such category of historic properties is comprised of prehistoric or historic archaeological resources. The National Register of Historic Places defines an archaeological site as "the place or places where the remnants of a past culture survive in a physical context that allows for the interpretation of these remains" (National Register Bulletin 36, "Guidelines for Evaluating and Registering Historical Archaeological Sites and Districts," 1993, p. 2). Such properties may meet criteria for inclusion in the National Register of Historic Places for a variety of reasons, not the least of which may be because "they have yielded, or may be likely to yield, information important to prehistory or history" (National Register Criteria for Evaluation, 36 CFR 60.4).

In the context of taking into account the effects of a proposed Federal or federally-assisted undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register, potential impacts to archaeological sites often need to be considered. Appropriate treatments for affected archaeological sites, or portions of archaeological sites, may include active preservation in place for future study or other use, recovery or partial recovery of archaeological data, public interpretive display, or any combination of these and other measures.

Archaeological Sites and Their Treatment

The nature and scope of treatments for such properties should be determined in consultation with other parties, but in the Council's experience they generally need to be guided by certain basic principles:

- The pursuit of knowledge about the past is in the public interest.
- An archaeological site may have important values for living communities and cultural descendants in addition to its significance as a resource for learning about the past; its appropriate treatment depends on its research significance, weighed against these other public values.
- Not all information about the past is equally important; therefore, not all archaeological sites are equally important for research purposes.
- Methods for recovering information from archaeological sites, particularly large-scale excavation, are by their nature destructive. The site is destroyed as it is excavated. Therefore

management of archaeological sites should be conducted in a spirit of stewardship for future generations, with full recognition of their non-renewable nature and their potential multiple uses and public values.

- Given the non-renewable nature of archaeological sites, it follows that if an archaeological site can be practically preserved in place for future study or other use, it usually should be (although there are exceptions). However, simple avoidance of a site is not the same as preservation.

- Recovery of significant archaeological information through controlled excavation and other scientific recording methods, as well as destruction without data recovery, may both be appropriate treatments for certain archaeological sites.

- Once a decision has been made to recover archaeological information through the naturally destructive methods of excavation, a research design and data recovery plan based on firm background data, sound planning, and accepted archaeological methods should be formulated and implemented. Data recovery and analysis should be accomplished in a thorough, efficient manner, using the most cost-effective techniques practicable. A responsible archaeological data recovery plan should provide for reporting and dissemination of results, as well as interpretation of what has been learned so that it is understandable and accessible to the public. Appropriate arrangements for curation of archaeological materials and records should be made. Adequate time and funds should be budgeted for fulfillment of the overall plan.

- Archaeological data recovery plans and their research designs should be grounded in and related to the priorities established in regional, state, and local historic preservation plans, the needs of land and resource managers, academic research interests, and other legitimate public interests.

- Human remains and funerary objects deserve respect and should be treated appropriately. The presence of human remains in an archaeological site usually gives the site an added importance as a burial site or cemetery, and the values associated with burial sites need to be fully considered in the consultation process.

- Large-scale, long-term archaeological identification and management programs require careful consideration of management needs, appreciation for the range of archaeological values represented, periodic synthesis of research and other

program results, and professional peer review and oversight.

Resolving Adverse Effects Through Recovery of Significant Information From Archaeological Sites

Under 36 CFR 800.5, archaeological sites may be "adversely affected" when they are threatened with unavoidable physical destruction or damage. Based on the principles articulated above, the Council recommends that the following issues be considered and addressed when archaeological sites are so affected, and recovery of significant information from them through excavation and other scientific means is the most appropriate preservation outcome.

If this guidance is followed, it is highly unlikely that the Council would decide to enter the consultation process under 36 CFR 800.6 or raise objections to the proposed resolution of adverse effects in a given case, unless it is informed of serious problems by a consulting party or a member of the public.

1. The archaeological site should be significant and of value chiefly for the information on prehistory or history they are likely to yield through archaeological, historical, and scientific methods of information recovery, including archaeological excavation.

2. The archaeological site should not contain or be likely to contain human remains, associated or unassociated funerary objects, sacred objects, or items of cultural patrimony as those terms are defined by the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001).

3. The archaeological site should not have long-term preservation value, such as traditional cultural and religious importance to an Indian tribe or a Native Hawaiian organization.

4. The archaeological site should not possess special significance to another ethnic group or community that historically ascribes cultural or symbolic value to the site and would object to the site's excavation and removal of its contents.

5. The archaeological site should not be valuable for potential permanent in-situ display or public interpretation, although temporary public display and interpretation during the course of any excavations may be highly appropriate.

6. The Federal Agency Official should have prepared a data recovery plan with a research design in consultation with the SHPO/THPO and other stakeholders that is consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties, the Secretary of the Interior's Standards and

Guidelines for Archaeology and Historic Preservation, and the Advisory Council on Historic Preservation's Treatment of Archaeological Properties: A Handbook. The plan should specify: (a) The results of previous research relevant to the project; (b) research problems or questions to be addressed with an explanation of their relevance and importance; (c) the field and laboratory analysis methods to be used with a justification of their cost-effectiveness and how they apply to this particular property and these research needs; (d) the methods to be used in artifact, data, and other records management; (e) explicit provisions for disseminating the research findings to professional peers in a timely manner; (f) arrangements for presenting what has been found and learned to the public, focusing particularly on the community or communities that may have interests in the results; (g) the curation of recovered materials and records resulting from the data recovery in accordance with 36 CFR part 79 (except in the case of unexpected discoveries that may need to be considered for repatriation pursuant to NAGPRA); and (h) procedures for evaluating and treating discoveries of unexpected remains or newly identified historic properties during the course of the project, including necessary consultation with other parties.

7. The Federal Agency Official should ensure that the data recovery plan is developed and will be implemented by or under the direct supervision of a person, or persons, meeting at a minimum the Secretary of the Interior's Professional Qualifications Standards (48 FR 44738-44739).

8. The Federal Agency Official should ensure that adequate time and money to carry out all aspects of the plan are provided, and should ensure that all parties consulted in the development of the plan are kept informed of the status of its implementation.

9. The Federal Agency Official should ensure that a final archaeological report resulting from the data recovery will be provided to the SHPO/THPO. The Federal Agency Official should ensure that the final report is responsive to professional standards, and to the Department of the Interior's Format Standards for Final Reports of Data Recovery Programs (42 FR 5377-79).

10. Large, unusual, or complex projects should provide for special oversight, including professional peer review.

11. The Federal Agency Official should determine that there are no unresolved issues concerning the recovery of significant information with

any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to the affected property.

12. Federal Agency Officials should incorporate the terms and conditions of this recommended approach into a Memorandum of Agreement or Programmatic Agreement, file a copy with the Council per § 800.6(b)(iv), and implement the agreed plan. The agency should retain a copy of the agreement and supporting documentation in the project files.

Model Memorandum of Agreement

[See Attached Form]

MEMORANDUM OF AGREEMENT FOR RECOVERY OF SIGNIFICANT INFORMATION

FROM ARCHAEOLOGICAL SITE(S) _____
(list) _____

UNDERTAKING: _____

STATE: _____

AGENCY: _____

Whereas, in accordance with 36 CFR Part 800, the [Federal Agency] acknowledges and accepts the advice and conditions outlined in the Council's "Recommended Approach for Consultation on the Recovery of Significant Information from Archaeological Sites," published in the Federal Register on [date of publication]; and

Whereas, the consulting parties agree that recovery of significant information from the archaeological site(s) listed above may be done in accordance with the published guidance; and

Whereas, the consulting parties agree that it is in the public interest to expand funds to implement this project through the recovery of significant information from archaeological sites to mitigate the adverse effects of the project; and

Whereas, the consulting parties agree that Indian Tribes or Native Hawaiian organizations that may attach religious or cultural importance to the affected property(ies) have been consulted and have raised no objection to the work proposed; and

Whereas, to the best of our knowledge and belief, no human remains, associated or unassociated funerary objects or sacred objects, or objects of cultural patrimony as defined in the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001), are expected to be encountered in the archaeological work;

Now, therefore, the [Federal Agency] shall ensure that the following terms and conditions, including the appended Archaeological Data Recovery Plan, will be implemented in a timely manner and with adequate resources in compliance with the National Historic Preservation Act of 1966 (16 U.S.C. 470).

OTHER TERMS AND CONDITIONS:

- Modification, amendment, or termination of this agreement as necessary shall be accomplished by the signatories in the same manner as the original agreement.

• Disputes regarding the completion of the terms of this agreement shall be resolved by the signatories. If the signatories cannot agree regarding a dispute, any one of the signatories may request the participation of the Council to assist in resolving the dispute.

• This agreement shall be null and void if its terms are not carried out within 5 (five) years from the date of its execution, unless the signatories agree in writing to an extension for carrying out its terms.

Agency Official: _____
date: _____

State Historic Preservation Officer: _____
date: _____

Tribal Historic Preservation Officer: Official: _____
date: _____

Other Public or Private Entity: _____
date: _____
(as applicable)

[Attach Archaeological Data Recovery Plan here]

[End of Form]

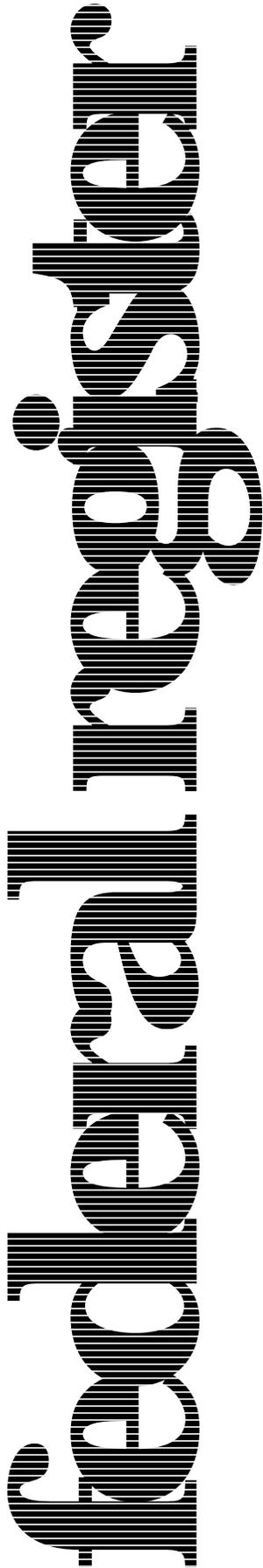
Dated: May 7, 1999.

John M. Fowler,

Executive Director.

[FR Doc. 99-12055 Filed 5-17-99; 8:45 am]

BILLING CODE 4310-10-M



Tuesday
May 18, 1999

Part III

**National Credit
Union Administration**

12 CFR Parts 702 and 747
Prompt Corrective Action; Proposed Rule

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 702 and 747

Prompt Corrective Action

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed Rule.

SUMMARY: In 1998, Congress amended the Federal Credit Union Act to require the NCUA Board to adopt, by regulation, a system of "prompt corrective action" to be taken by NCUA and by federally-insured credit unions if they become undercapitalized. The new FCUA provision imposes a series of progressively more stringent restrictions and requirements indexed to five capital categories which it establishes for federally-insured credit unions. It also mandates a separate system of prompt corrective action for "new" credit unions and an additional risk-based net worth requirement for "complex" credit unions. The proposed rule combines the components of prompt corrective action which are expressly prescribed by statute (except the risk-based net worth requirement for "complex" credit unions) with those NCUA is responsible for developing to suit credit unions. The rule also establishes conforming reserve and dividend payment requirements, and procedures for reviewing and enforcing directives imposing prompt corrective action.

DATES: Comments must be received on or before August 16, 1999.

ADDRESSES: Direct comments to Becky Baker, Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428. Fax comments to (703) 518-6319. Please send comments by one method only.

FOR FURTHER INFORMATION CONTACT: Herbert S. Yolles, Deputy Director, Office of Examination and Insurance, at the above address or telephone (703) 518-6362; or Steven W. Wideman, Trial Attorney, Office of General Counsel, at the above address or telephone (703) 518-6557.

SUPPLEMENTARY INFORMATION:

A. Background

1. The Credit Union Membership Access Act

On August 7, 1998, Congress enacted the Credit Union Membership Access Act, Public Law No. 105-219, 112 Stat. 913 (1998). Section 103 of the statute added a new section 216 to the Federal Credit Union Act (FCUA), 12 U.S.C.

1790d (hereinafter referred to as "CUMAA" or "the statute" and cited as "§ 1790d"). Section 1790d requires the NCUA Board to adopt by regulation a system of "prompt corrective action" (sometimes referred to as "PCA") to be taken by NCUA when a federally-insured "natural person" credit union becomes undercapitalized. The stated purpose of § 1790d is to "resolve the problems of insured credit unions at the least possible long-term loss to the [National Credit Union Share Insurance Fund (NCUSIF)]." § 1790d(a)(1). The system of PCA for credit unions must take into account the distinguishing features of credit unions: that they are cooperatives that do not issue capital stock, must rely on retained earnings to build net worth, and have primarily volunteer boards of directors. § 1790d(b)(1)(B).

Much of the system of PCA for credit unions is expressly prescribed by § 1790d. This includes the five net worth categories and the net worth measures for each, the requirement to submit a Net Worth Restoration Plan, the requirement to annually transfer a portion of earnings to net worth, restrictions on increasing assets and on increasing member business loans, and conditions triggering mandatory conservatorship and liquidation. §§ 1790d(c), (e), (f), (g), (i); 12 U.S.C. 1786(h)(1)(F) and (G), 1787(a)(3)(A). The implementing regulations adhere to the substance of the statutory components of PCA.

To complete the framework of PCA for credit unions, CUMAA authorizes NCUA to develop, by regulation, a comprehensive series of discretionary supervisory actions to complement the mandatory supervisory actions prescribed by statute. The statutory criteria for these discretionary actions are that they must be consistent with the purpose of § 1790d, and must be "comparable"¹ to the "discretionary safeguards" which the Federal banking agencies² are permitted to impose under section 38 of the Federal Deposit Insurance Act, 12 U.S.C. 1831o (FDIA § 38)³—the statute which established

¹ "Comparable" is defined as "parallel in substance (though not necessarily identical in detail) and equivalent in rigor." S. Rep. at 12.

² The Federal banking agencies consist of the Federal Reserve Board, the Office of Comptroller of the Currency, the Federal Deposit Insurance Corporation (FDIC) and the Office of Thrift Supervision. § 1790d(o)(1) incorporating 12 U.S.C. 1813(z). Their Joint Final Rule establishing a system of prompt corrective action pursuant to 12 U.S.C. 1831o is published at 57 FR 44886 (Sept. 29, 1992).

³ Section 38 of the Federal Deposit Insurance Act, 12 U.S.C. 1831o, was added by section 131 of the Federal Deposit Insurance Corporation Improvement Act, Pub. L. 102-242, 105 Stat. 2236 (1991).

prompt corrective action for federally-insured depository institutions. § 1790d(b)(1)(A); S. Rep. No. 193, 105th Cong., 2d Sess. 12 (1998) (S. Rep.); H.R. Rep. No. 472, 105th Cong., 2d Sess. 23 (1998) (H.R. Rep. at 23). Accordingly, the proposed implementing regulations establish a series of discretionary supervisory actions indexed to the "undercapitalized" and lower net worth categories. NCUA has the discretion to impose these restrictions and requirements to further the purpose of prompt corrective action. Although comparable to FDIA § 38, these discretionary supervisory actions are tailored to suit the distinctive characteristics of credit unions.

For credit unions which CUMAA defines as "new"—those in operation less than ten years and which have \$10 million or less in assets—the statute requires NCUA to develop an alternative system of prompt corrective action to apply in lieu of the system prescribed by CUMAA for all other federally-insured credit unions. § 1790d(b)(2)(A); see U.S. Dept. of Treasury, *Credit Unions* (Washington, D.C. 1997) at 79. The alternative system of PCA must recognize that "new" credit unions initially have no net worth, need reasonable time to accumulate net worth, and need incentives to become "adequately capitalized" by the time they are no longer "new." § 1790d(b)(2)(B). Accordingly, although it follows the "net worth category" model, the system of PCA for new credit unions has relaxed net worth ratios, allows regulatory forbearance, and offers incentives to build net worth.

CUMAA requires NCUA to formulate the definition of a "complex" credit union according to the risk level of its portfolio of assets and liabilities. § 1790d(d)(1). "Well capitalized" and "adequately capitalized" credit unions which meet that definition will be subject to an additional "risk-based net worth requirement" to compensate for "any material risks against which the [statutory net worth ratio for "adequately capitalized"] may not provide adequate protection." § 1790d(d)(2). The "risk-based net worth requirement" for "complex" credit unions will be the subject of a separate proposed rule to be issued by the NCUA Board in late 1999.

CUMAA requires NCUA to implement an independent appeal process by which affected credit unions and certain officials can appeal to the NCUA Board decisions by NCUA staff to impose discretionary restrictions or requirements. § 1790d(k). To fulfill this mandate, the proposed rule adds a new subpart L to part 747 of NCUA's

regulations, 12 CFR 747.2001, establishing procedures for issuance, review and enforcement of directives requiring prompt corrective action. Subpart L generally provides a right of notice of the decision to impose a discretionary restriction or requirement, and an opportunity to respond to the notice, an informal hearing if requested in certain cases, and NCUA Board review of the decision.

Although not required by CUMAA, the proposed rule retains in substance certain of NCUA's current reserve and dividend payment requirements. In subpart C, these requirements have been modified to reflect repeal of FCUA § 116, 12 U.S.C. 1762, and to conform to CUMAA's earnings retention requirement. § 1790d(e).

Finally, in formulating regulations to implement a system of PCA for credit unions, CUMAA required NCUA to consult with the Secretary of the Treasury, the Federal banking agencies, and State officials having jurisdiction over federally-insured, State-chartered credit unions. CUMAA § 301(c). To that end, the proposed rule is a product of consultation with representatives of the Department of the Treasury, solicitation of comments from the Federal banking agencies, and collaboration with a committee of representative State credit union supervisors.

2. Statutory Timetable

CUMAA set deadlines for NCUA to issue proposed rules and final rules on PCA, and dates for those rules to take effect. Congress directed NCUA to commence rulemaking by issuing an Advance Notice of Proposed Rulemaking (ANPR) addressing only the "risk-based net worth requirement" for "complex" credit unions, no later than February 3, 1999. CUMAA § 301(d)(2)(A). To fulfill that requirement, NCUA issued an ANPR soliciting public comment not only on the "risk-based net worth requirement" for "complex" credit unions, but also regarding PCA for "new" credit unions and the contents, criteria, and deadlines for a Net Worth Restoration Plan. 63 FR 57938 (October 29, 1998). The great majority of the 34 comments NCUA

received by the January 27, 1999, deadline addressed the risk-based net worth requirement for "complex" credit unions, which is not the subject of this rule.

CUMAA directs NCUA to propose rules for PCA (other than the "risk-based net worth requirement" for "complex" credit unions) no later than May 4, 1999, and to adopt final rules no later than February 7, 2000, to take effect August 7, 2000. CUMAA § 301(d)(1) and (e)(1). While no date is prescribed for a proposed rule on the "risk-based net worth requirement" for "complex" credit unions, NCUA is required to issue the final no later than August 7, 2000, to take effect January 1, 2001. CUMAA § 301(d)(2)(B) and (e)(2). NCUA plans to issue a proposed rule on the "risk-based net worth requirement" for "complex" credit unions in late 1999.

3. Report to Congress

CUMAA requires NCUA to report to Congress twice in the rulemaking process for prompt corrective action—first when proposed rules are published, and again when final rules are adopted (February 7, 2000). CUMAA § 301(f); S. Rep. at 19; H.R. Rep. at 23. The report must explain how NCUA's implementing regulations establish a system of PCA which is consistent with the cooperative character of credit unions. CUMAA § 301(f)(1); see § 1790d(b)(1)(B). Further, the report must identify how NCUA's implementing regulations differ from FDIA § 38 and the reasons for those differences. CUMAA § 301(f)(2). NCUA expects to report that the proposed rule is comparable in nearly all respects to FDIA § 38, i.e., that it is parallel in substance and equivalent in rigor.

4. Notice of Proposed Rulemaking

Through this notice, NCUA invites public comment on all aspects of its proposed rule. Broad public input addressing the proposed rule will assist the NCUA Board in tailoring a system of prompt corrective action that is workable, fair and effective in light of the cooperative character of credit unions. See S. Rep. at 14. Although

NCUA lacks discretion to modify the substance of components of prompt corrective action prescribed by statute, the proposed rule establishes a comprehensive array of discretionary restrictions and requirements adapted, with modifications, from FDIA § 38. Comments addressing these and other non-statutory components of the proposed rule—such as the contents and criteria for approval of a net worth restoration plan, and the alternative system of PCA for new credit unions—will be most helpful.

B. Framework of Proposed Rule

The proposed rule consists of four parts. Subpart A is the system of PCA for all federally-insured credit unions except those which meet the statutory definition of "new." Subpart B is the alternative system of PCA which the statute required NCUA to develop exclusively for "new" credit unions. For ease of access, in subparts A and B, all of the supervisory actions which apply to a credit union in a particular net worth category are combined in a single section devoted exclusively to that category. The supervisory actions and corresponding net worth categories are depicted in Appendices A and B to the preamble of this rule. Subpart C restates certain reserve, dividend payment and other requirements, modified to facilitate the earnings retention requirement in subparts A and B. Finally, subpart L of part 747 provides for notice, review and enforcement of certain supervisory actions imposed under subparts A and B.

1. Net Worth Classification

Statutory net worth categories. Section 702.101(a) sets forth the five net worth categories which CUMAA establishes for all federally-insured credit unions, other than those which are "new," and the corresponding net worth ratio of each. § 1790d(c). The range of net worth ratios for each net worth category (assuming no risk-based net worth requirement) and the percentage and number of federally-insured credit unions that fall within each category as of December 1998, are depicted as follows:

Net worth category	Net worth ratio	Percent of all FICUs	Number of all FICUs
"Well Capitalized"	7% or above	94.03	10,339
"Adequately Capitalized"	6% to 6.99%	2.80	308
"Undercapitalized"	4% to 5.99%	2.06	227
"Significantly Undercapitalized"	2% to 3.99%	0.59	65
"Critically Undercapitalized"	Less than 2% ...	0.51	56

Adjustment of Net Worth Category. Part 702 incorporates the two statutory criteria for requiring a downward adjustment of a credit union's original net worth category to a lower one.⁴ §§ 702.101(a)(4)(B) and (a)(1)–(2). First, a credit union classified as “undercapitalized,” and which has a net worth ratio of less than 5%, must be downgraded to “significantly undercapitalized” if it fails to timely file or implement a Net Worth Restoration Plan.⁵ § 1790d(c)(1)(D)(ii). See also § 702.109(g). Second, credit unions otherwise categorized as either “well capitalized” or “adequately capitalized,” and which meet the

definition of “complex,” will be subject to a risk-based net worth requirement. § 1790d(c)(1)(A)(ii) and (c)(1)(B)(2). Credit unions which do not meet the risk-based requirement in either category are required to be reclassified “undercapitalized.” § 1790d(c)(1)(C)(ii).

Reclassification of Net Worth Category. Apart from statutory adjustment, CUMAA authorizes reclassification of a credit union on safety and soundness grounds, consistent with FDIA § 38(g). § 1790d(h). The proposed rule thus provides that the NCUA Board may reclassify to the next lower net worth category a credit union originally classified above “significantly

undercapitalized” if that credit union is either in an unsafe or unsound condition or has failed to correct an unsafe or unsound practice. §§ 702.101(b) and 702.202(d). The authority to make a final decision to reclassify on these grounds cannot be delegated, § 1790d(h)(2), and when exercised, requires notice to the credit union and an opportunity to respond and to request an informal hearing. § 747.2003.

The statutory criteria for mandatory adjustment of a net worth category and for discretionary reclassification on safety and soundness grounds under part 702 are summarized as follows:

Original category	Additional criterion	Grounds to reclassify or adjust category	Adjusted or reclassified to . . .
“Well Capitalized” “Adequately Capitalized”	Must be “complex”	Must be “complex”	Adjusted to “Undercapitalized”.
“Undercapitalized”	Net worth ratio less than 5%	Net worth ratio less than 5%	“Significantly Undercapitalized”.
“Well Capitalized” or “Adequately Capitalized”	None	None	Discretion to reclassify to next lower category.
“Undercapitalized” or “significantly undercapitalized”	None	Unsafe or unsound	Discretion to treat as if in next lower category.
“Well Capitalized” or “Adequately Capitalized” new credit union.	must be “new”	condition or practice	Discretion to reclassify to next lower category.
“Moderately Capitalized” or “Marginally Capitalized” new credit union.	Must be “new”	Must be “new”	Discretion to treat as if in next lower category.

Notice and effective date of net worth classification. Section 1790d is silent about how and when a credit union has notice of its net worth ratio and corresponding classification. Part 702 generally deems a credit union to have notice of its net worth ratio and to have become classified within the corresponding net worth category on a quarterly basis, coinciding with the end of the credit union's quarterly dividend period or every monthly dividend period, as the case may be. § 702.3(b)(1). This imposes no additional burden on credit unions because the net worth ratio is derived from their financial statements, which federally- and State-chartered credit unions already prepare monthly.⁶ See Standard By-Law Art. VIII, § 5(d). Once a credit union has notice that a change in its net worth places it in a lower net worth category, the credit union must notify NCUA in writing within 15 days. § 702.3(c). A

credit union may rely on NCUA or the appropriate State official for notice of its net worth category only when it is given in an examination report, notice of reclassification on safety and soundness grounds, or notice of adjustment to its net worth ratio to reflect an accounting adjustment. §§ 702.3(b)(2)–(3), 747.2003(a)(1)(ii).

2. Prompt Corrective Action by Net Worth Category

The following is a summary of the mandatory and discretionary supervisory actions that apply under part 702 to each statutory net worth category. These are also depicted in Appendix A and B to the preamble of this rule. Each supervisory action is explained in greater detail beginning in subsequent sections:

“Well Capitalized”. A credit union classified “well capitalized” under part

702 is subject to no prompt corrective action.

“Adequately Capitalized”. A credit union classified “adequately capitalized” must comply with a single mandatory supervisory action—an “earnings retention requirement” under which the credit union transfers to its regular reserve an amount of earnings equal to a proportion of the credit union's total assets. § 702.104. It is not subject to any discretionary supervisory actions.

“Undercapitalized”. A credit union classified “undercapitalized” must comply with four mandatory supervisory actions—

- Transfer of earnings to its regular reserve an amount of earnings equal to no less than 4/10ths percent of the credit union's average total assets;
- Restrict total assets to the average of the credit union's assets over the preceding 12 calendar months (unless

⁴ Apart from adjustments to net worth category classification, the proposed rule gives NCUA the authority to adjust a credit union's net worth net worth ratio to reflect the impact of certain accounting adjustments. § 702.3(d).

⁵ 5% falls mid-way between the 4% floor of the “undercapitalized” category and its 5.99% ceiling. See § 702.101(a)(3). An “undercapitalized” credit

union having a new worth ratio of between 5% and 5.99% is not subject to a downward adjustment for failure to timely file or implement a New Worth Restoration Plan, although it would be subject to other means of enforcement.

⁶ Federal depository institutions rely on quarterly Call Reports to determine the “leverage ratio” (the equivalent of a net worth ratio) on a quarterly basis.

Part 702 does not rely on Call Reports to determine credit union's net worth because only credit unions having \$50 million or more in assets file them quarterly, 12 CFR 741.6(a); other credit unions file Call Reports semi-annually.

an approved Net Worth Restoration Plan provides for increasing assets);

- Submit and implement a Net Worth Restoration Plan; and
- Restrict the making of member business loans (unless primarily in the business of making such loans).

§ 702.105(a). An “undercapitalized” credit union also is subject to one or more of the following discretionary supervisory actions which NCUA is authorized to impose to further the purpose of part 702: Prior approval by NCUA for acquisitions, branching, new lines of business.

- Restrict CUSO transactions and ownership.
- Restrict dividends paid on shares.
- Prohibit asset growth or reduce it (below the preceding year’s average).
- Alter, terminate or reduce any activity.
- Prohibit nonmember deposits.
- Other actions no more severe than the preceding discretionary actions.
- Order new election of board of directors.
- Dismiss directors or senior executive officers.
- Require employment of qualified senior executive officers.

§ 702.105(b).

“Significantly Undercapitalized”.

Credit unions classified “significantly undercapitalized” are subject to all of the same mandatory and discretionary supervisory actions as an “undercapitalized” credit union, except for the “no more severe” limitation on “other actions” taken in addition to those enumerated for that category.

§ 702.106(a)-(b). A “significantly undercapitalized” credit union also is subject to the following additional discretionary supervisory actions:

- Restrict senior executive officers’ compensation and bonus.
- Require merger with another financial institution if grounds exist for conservatorship or liquidation.

§ 702.106(b)(7) and (9).

Apart from these mandatory and discretionary supervisory actions, the NCUA Board may place a “significantly undercapitalized” credit union into conservatorship or liquidation if it “has no reasonable prospect of becoming ‘adequately capitalized.’”

§ 702.106(c); 12 U.S.C. 1786(h)(1)(f), 1787(a)(3)(A)(i).

“Critically Undercapitalized”. A credit union classified “critically undercapitalized” is subject to all of the same mandatory and discretionary supervisory actions as a “significantly undercapitalized” credit union.

§ 702.107(a)-(b). A “critically undercapitalized” credit union also is

subject to the following additional discretionary supervisory actions:

- Restrict payments on uninsured secondary capital.
- Require NCUA prior approval for certain actions.

§ 702.107(b)(9)-(10).

Apart from these mandatory and discretionary supervisory actions, the NCUA Board must place a “critically undercapitalized” credit union into conservatorship or liquidation within 90 days, unless the NCUA Board determines that other corrective action in lieu of conservatorship or liquidation would better achieve the purposes of prompt corrective action.

§ 702.107(c)(1). That determination expires at the end of a period of no more than 180 days, § 702.107(c)(1)(C), and if not affirmed within that period, the credit union must be conserved or liquidated. § 702.107(c)(2). Even if that determination is renewed for another period of up to 180 days, the NCUA Board must conserve or liquidate a “critically undercapitalized” credit union which remains in that category on average for a full calendar quarter following a period of 18 months from the date it initially became “critically undercapitalized,” § 702.107(c)(3)(i), unless certain statutory requirements for an exception are met. § 702.07(c)(3)(ii).

3. Proposed Rule Provisions Applicable to All Credit Unions

The following provisions of part 702 form the framework of prompt corrective action under both subparts A and B, and apply to all net worth categories:

Definitions. Section 702.2 adopts the statutory definitions set forth in § 1790d(o), with four additions. First, the term “appropriate State official” is defined so as to abbreviate references throughout part 702. § 702.2(a). Second, the definition of “Credit Union Service Organization” (CUSO) is expanded beyond the existing definition, 12 C.F.R. 712.3(a), which is limited to federally-chartered credit unions. § 702.2(c). This will ensure that CUSOs of federally-insured State-chartered credit unions are within the scope of discretionary restrictions on CUSO transactions and ownership. E.g., § 702.105(b)(2). Third, the terms “credit union” and “shares” are defined to ensure that part 702 encompasses State-chartered credit unions and analogous terms for shares under applicable State law. § 702.2(b) and (h). Finally, the term “total assets” is defined as the average of total assets reported by a credit union on its most recent four quarterly Call Reports, or for semiannual filers, on its two most recent semi-annual Call Reports. § 702.2(i).

The statutory definition of “net worth”—“retained earnings balance of the credit union, as determined under generally accepted accounting principles [GAAP]”—will in some cases distort the “net worth ratio” as a true measure of actual capital strength. § 702.2(e); § 1790d(o)(2)(A). The GAAP definition of “retained earnings” does not include items of “other comprehensive income” such as unrealized gains or losses on available-for-sale (AFS) securities (Call Report account 945).⁷ As a result, when the fair value of AFS securities falls, that reduction is not reflected in net worth, artificially overstating the credit union’s “net worth ratio” and possibly forestalling appropriate prompt corrective action.⁸ In response to this dilemma, the proposed rule authorizes the NCUA Board to adjust a credit union’s net worth ratio to reflect accounting adjustments such as gains and losses in the fair value of AFS securities. § 702.203(d).

Consultation With State Officials. Part 702 tracks the statutory requirement that NCUA consult with the appropriate State credit union official when taking prompt corrective action against a federally-insured State-chartered credit union (FISCU). § 1790d(l). Before placing a FISCU into conservatorship or liquidation to facilitate prompt corrective action, NCUA must consult with the appropriate State official, provide reasons for the proposed action, give the official an opportunity to respond, and allow the official to place the FISCU into conservatorship or liquidation. § 702.108(a). If the State official does not concur in the conservatorship or liquidation decision, the NCUA Board cannot proceed unless it makes certain findings of risk of loss to the NCUSIF. § 702.108(a)(3); see also 12 U.S.C. 1786(h)(2)(C), 1787(b).

⁷ Under GAAP, “retained earnings” consists of undivided earnings, statutory reserves, and other appropriations as defined by management or regulatory authorities. AICPA, *Audit & Accounting Guide: Audits of Credit Unions* at § 11.01 (1998).

⁸ For example, assume a credit union has retained earnings under GAAP of \$6500 and total assets of \$100,000; it would have a net worth ratio of 6.5% and would be classified “adequately capitalized.” Assume that during the next quarter, the credit union experiences an \$8,000 decrease in the fair value of its available-for-sale (AFS) securities. This unrealized loss would be reflected in total assets (the denominator of the net worth ratio), reducing them to \$92,000. However, under the statutory definition of “net worth,” the unrealized loss would not be reflected at all in retained earnings (the numerator of the net worth ratio), and would still be \$6500. As result, the credit union would have a net worth ratio of 7.06% and be classified “well capitalized” despite having sustained a decline in the fair value of its AFS securities. Conversely, an understated net worth ratio results when the credit union experiences an unrealized gain in the fair value of its AFS securities.

To satisfy the requirement that NCUA "consult and seek to work cooperatively with State officials" when implementing prompt corrective action, § 1790d(l)(1), part 702 generally provides throughout for participation by the appropriate State official in decisions about a FISCU on which prompt corrective action is predicated. Specifically, part 702 provides that NCUA "shall notify the appropriate State official before taking any discretionary action" concerning a FISCU and "shall allow the appropriate State official to take the proposed action independently or jointly with NCUA." § 702.108(c). When evaluating a FISCU's Net Worth Restoration Plan, NCUA must consult with State officials. § 702.109(d)(2). To facilitate consultation, a FISCU which submits a Net Worth Restoration Plan to NCUA must submit a duplicate to the appropriate State official. § 702.109(a)(1). When a FISCU, or an official who it has been ordered to dismiss, seeks review of a decision to impose a discretionary supervisory action, the appropriate State official must be served with a copy of all notices and decisions issued by NCUA, and responses and requests filed by the FISCU or its official. § 747.2001(b).

C. Mandatory and Discretionary Supervisory Actions

1. Mandatory Actions Prescribed by Statute

Under the proposed rule, each of the following mandatory supervisory actions is a self-executing legal obligation of a credit union once it is classified within a net worth category requires that action. The legal obligation is not triggered by notification from NCUA.

Earnings transfer to regular reserve. The proposed rule adopts the mandatory "earnings retention requirement" under which credit unions classified "adequately capitalized" or lower must "annually set aside as net worth an amount equal to not less than 0.4% of its total assets." § 1790d(e)(1). However, CUMAA does not answer how or when a credit union's total assets should be measured for this purpose, or where the earnings set aside should be held. To measure "total assets," part 702 uses the average of the credit union's total assets as set forth in its most recent four quarterly Call Reports or most recent two semi-annual Call Reports, as the case may be. § 702.2(i). Measuring total assets on a single day, such as the last day the prior quarter or prior year, would not take into account seasonal fluctuations in

asset size. The rule also directs that the resulting amount of earnings to be set aside over the ensuing year is to be transferred in installments to the credit union's regular reserve. A credit union having a monthly dividend period for regular shares must make monthly transfers of at least 8.334%, or 1/12th, of the annual sum. § 702.104(a)(1). A credit union having a quarterly or less frequent dividend period for regular shares must make a quarterly transfer of at least 25%, or 1/4 of the annual sum. § 702.104(a)(2).

Part 702 also amplifies the terms of the statutory exception to the 0.4% minimum set aside. § 1790d(e)(2). First, the NCUA Board interprets the phrase "by order" to indicate that exceptions to 0.4% statutory minimum are to be granted on a case-by-case basis. § 702.104(b). Second, the proposed rule implements the mandate to "periodically review any order" decreasing the 0.4% statutory minimum by requiring "review and revocation no less frequently than quarterly," to coincide with the dividend period for regular shares which is common among credit unions. *Id.*

Net Worth Restoration Plan. The requirement to implement a Net Worth Restoration Plan (NWRP) emerges as the hallmark of prompt corrective action. To restore a credit union's net worth to the "adequately capitalized" level, CUMAA provides that credit unions classified "undercapitalized" or lower must timely submit to the NCUA Board and implement a NWRP. § 1790d(f)(1). The statute requires NCUA to establish "reasonable" deadlines for submission of NWRPs; set "expeditious" deadlines for NCUA to act on them; allow credit unions which fail to timely submit an NWRP a further opportunity to do so; and allow a credit union whose NWRP is not approved an opportunity to submit a revised NWRP. § 1790d(f)(3)-(4). Further, credit unions having less than \$10 million in assets are entitled to receive assistance in preparing an NWRP. § 1790d(f)(2).

To fulfill this mandate, the proposed rule sets a 45-day period for submitting an NWRP, and if that deadline is not met, allows an additional 15 days to submit an NWRP. § 702.109(a)(1). The NCUA Board is required to act on an initial NWRP within 60 days, and to provide reasons in the event of disapproval. § 702.109(e)(1). When an initial NWRP is not approved, the credit union is given 30 days to file a revised NWRP, on which the NCUA Board is required to act within 30 days of receipt. § 702.109(f). The periods for submission and review of an initial NWRP parallel those which FDIA § 38(e)(2)(D)(ii) sets

for "capital restoration plans"—the federally-insured depository institutions' analog to an NWRP—and are consistent with comments on the topic received in response to the ANPR. The NCUA Board has declined to set a deadline by which a credit union having less than \$10 million in assets must request assistance in preparing an NWRP; under the proposed rule, NCUA will provide assistance simply "upon timely request." § 702.109(b).

CUMAA is silent as to the contents of an NWRP, and sets just a single standard for approving one. § 1790d(f)(5). As comments received in response to the ANPR suggested, the NCUA Board has examined the contents and criteria that FDIA § 38 prescribes for a "capital restoration plan." With certain additions and adjustments to distinguish between credit unions and other depository institutions, the NCUA Board proposes to require for an NWRP much of the content information that FDIA § 38(e)(2)(B) demands of a "capital restoration plan." Accordingly, section 702.109(c) requires a proposed NWRP to specify—

- The steps the credit union will take to become "adequately capitalized";
- A specific timetable for increasing net worth during each year in which the NWRP will be in effect;
- How the credit union will comply with the mandatory and discretionary restrictions or requirements imposed on it under this part;
- The types and levels of activities in which the credit union will engage;
- The amount of earnings the credit union will transfer to its regular reserve account pursuant to the earnings retention requirement in section 702.104; and
- In the case of a plan submitted by a credit union which has been reclassified under § 702.101(b) on safety and soundness grounds, the steps the credit union will take to correct the unsafe or unsound practice(s) or condition(s).

§ 702.109(c)(1) (i)-(vi).

Finally, an NWRP must be accompanied by pro-forma financial statements covering the next two years, and financial data submitted in connection with an NWRP must generally conform to GAAP. § 702.109(c)(2) and (c)(4).

Similarly, to supplement the single statutory criterion for approval of a NWRP—that it be "based on realistic assumptions" and be "likely to succeed in restoring * * * net worth"—the NCUA Board proposes to adopt as appropriate for approving an NWRP the additional criteria which FDIA

§ 38(e)(2)(c) establishes for accepting a "capital restoration plan," with significant modifications addressed below. To be approved, section 702.109(d) requires an NWRP to—

- Be based on realistic assumptions and likely to succeed in restoring net worth;
- Comply with content requirements in section 702.109(c);
- Not unreasonably increase the credit union's exposure to risk (including credit risk, interest-rate risk, and other types of risk); and be supported by appropriate assurances from the credit union that it will comply with the plan until it has remained "adequately capitalized" for four (4) consecutive calendar quarters.

Whereas a "capital restoration plan" cannot "appreciably increase" risk exposure, an NWRP must "not unreasonably increase the credit union's exposure to risk." (emphasis added.) Compare FDIA § 38(e)(2)(C)(I)(III) with § 702.109(d)(3). This permits a credit union with little or no risk exposure to incur reasonable exposure to improve net worth. Approval of a "capital plan" requires a financial "guarantee" of compliance until "the institution becomes adequately capitalized on average during each of 4 consecutive calendar quarters," and "appropriate assurances" of performance. FDIA § 38(e)(2)(c)(ii). Section 702.109(d)(4) combines and condenses this pair of requirements into a single, criterion appropriate for credit unions—requiring "appropriate assurances" of compliance with the NWRP until the credit union "has remained 'adequately capitalized' for four (4) consecutive calendar quarters" on an absolute basis rather than just on average. The NCUA Board may delegate to its Regional Directors the authority to evaluate an NWRP according to the proposed criteria.

Restriction on increase in assets. Part 702 adopts CUMAA's limitation on increasing assets, which provides that a credit union classified "undercapitalized" or lower shall "not generally permit its average total assets to increase" unless doing so is consistent with the credit union's approved NWRP and the credit union increases assets and net worth at the rate the Plan prescribes. § 1790d(g)(1); § 702.105(a)(3). However, the statute does not specify the period over which "average total assets" should be calculated for purposes of limiting asset growth. Therefore, to avoid seasonal fluctuations in asset size, section 702.105(a)(3) relies on the definition of total assets in section 702.2(i).

In many cases, at the time a credit union becomes subject to the limit on

increasing assets, its total assets already will exceed the average for the preceding twelve months, raising the question whether it should be required to reduce assets to that level. Section 702.105(b)(4) gives the NCUA Board discretionary authority to prohibit a credit union classified "undercapitalized" or lower from increasing its total assets or an individual category of assets beyond an absolute level, or even to require the credit union to reduce total assets or a category of assets. Due to the availability of this complementary restriction, the NCUA Board declines to interpret the statutory asset limitation as requiring a reduction in assets to the level of average total assets over the preceding 12 months.

Restriction on increase in member business loans. CUMAA prohibits credit unions classified "undercapitalized" or lower from "mak[ing] any increase in the total amount of member business loans * * * outstanding at that credit union at any one time * * *" 1790d(g)(2). This imposes a freeze on member business lending, rather than confining it to an average. Part 702 incorporates within this restriction the exemptions Title II of CUMAA prescribes for "a credit union chartered for the purpose of making, or that has a history of primarily making, member business loans to its members," or which is designated low income, or which participates in the Community Development Financial Institutions program. 12 U.S.C. 1757a(b). Applying these exemptions to the proposed rule's member business loan restriction will ensure that prompt corrective action does not defeat the net worth restoration efforts of credit unions which rely heavily on member business lending.

Part 702's member business loan restriction is imposed "[n]otwithstanding" the Title II maximum on member business loans—1.75 times net worth for less than "well capitalized" credit unions; 12.25% of assets for those which are "well capitalized" (but not "complex"). 12 U.S.C. 1757a(a)(1). This makes it clear that the part 702 restriction is overriding. Thus, a credit union cannot claim to be entitled to increase member business loans to the Title II maximum before the part 702 restriction can take effect.

Conservatorship and Liquidation. CUMAA prescribes criteria for allowing and for mandating conservatorship and liquidation of a credit union classified "significantly undercapitalized" or "critically undercapitalized," § 1790d(i)(1)–(2), and amends the FCUA accordingly. CUMAA § 301(b). Section

702.106(b) faithfully reflects the statutory authority to place a "significantly undercapitalized" credit union into conservatorship or liquidation to facilitate prompt corrective action upon finding that the credit union "has no reasonable prospect of becoming adequately capitalized." 12 U.S.C. 1786(h)(1)(F), 1787(a)(3)(A)(i).

In the case of a "critically undercapitalized" credit union, regardless of its prospect of becoming "adequately capitalized," the NCUA Board must—

not later than 90 days after the date on which an insured credit union becomes critically undercapitalized—

- (A) appoint a conservator or liquidating agent for the credit union; or (B) take such other action as the Board determines would better achieve the purpose of [§ 1790d], after documenting why the action would better achieve that purpose.

§ 1790d(i)(1). Section 702.107(c) restates this mandate.

The statute provides that the determination to take other corrective action shall "cease to be effective not later than the end of the 180-day period beginning on the date on which the determination is made," and the credit union shall be placed into conservatorship or liquidation "unless the Board makes a new determination * * * before the end of the effective period of the prior determination" that continuing other corrective action will further the purpose of § 1790d. § 1790d(d)(2). Section 702.107(c)(2) implements this procedure for renewing other corrective action in lieu of conservatorship and liquidation. The NCUA Board interprets the "documenting" prerequisite for initially taking other corrective action as setting a standard for renewing that determination.

Regardless whether other corrective action restores net worth, the NCUA Board is required by statute to place the credit union into liquidation "if [it] is critically undercapitalized on average during the calendar quarter beginning 18 months after the date on which the credit union became critically undercapitalized." § 1790d(i)(3)(A). An exception to mandatory liquidation is allowed, however, and other corrective action may continue, if the NCUA Board makes three findings:

- That the credit union has substantially complied with a Net Worth Restoration Plan requiring improvement in net worth since the date the plan was approved;

- That the credit union has positive net income or a sustainable upward trend in earnings; and
 - That the credit union is viable and not expected to fail.
- § 1790d(i)(3)(B).

The mandate for liquidation of a "critically undercapitalized" credit union after 18 months, and the grounds for an exception to it, are incorporated in section 702.107(c)(3).⁹

Although faithful to the statutory language, section 702.107(c) is phrased to reveal flexibility that may not be apparent. First, the effective period of a determination to take "other corrective action" need not extend for the maximum duration of 180 days. The NCUA Board has the discretion to establish a shorter effective period. Further, the NCUA Board may reconsider any determination periodically, and reverse and discontinue the "other corrective action" altogether. To continue the action beyond an effective period, the NCUA Board must make a new finding prior to the end of the effective period that its "other corrective action" still furthers the purpose of prompt

corrective action. If the new finding is made, the "other corrective action" can continue for a new effective period that is appropriate to achieve the "other corrective action," which the NCUA Board may specify as any period of up to 180 days from the date of the determination. The new determination still can be reconsidered periodically, and renewed for an additional effective period or discontinued.

Second, if the credit union first became "critically undercapitalized" at the end of a calendar quarter, the last possible day for "other corrective action" may be as soon as 18 months plus 3 months of the next calendar quarter, for a total of 21 months. If the date the credit union first became "critically undercapitalized" was other than the end of a calendar quarter, the last possible day for "other corrective action" would extend to the end of the calendar quarter following the 21 months, for a total of up to 23 months.¹⁰

2. Discretionary Actions Under Statutory Authority

CUMAA requires NCUA to develop discretionary supervisory actions to

complement the mandatory ones it prescribes, provided they are consistent with the purpose of prompt corrective action, and are "comparable" to the "discretionary safeguards" in FDIA § 38. § 1790d(b)(1)(A). The discretionary supervisory actions NCUA proposes are generally allocated among the five statutory net worth categories in part 702 by corresponding capital category in FDIA § 38.¹¹ Throughout the proposed rule, the use of discretionary actions is conditioned upon furthering the purpose of part 702. However, NCUA is not required to give mandatory supervisory actions an opportunity to improve net worth before resorting to discretionary actions. Except as noted, there is no limit to the number or sequence in which the NCUA Board imposes one or more discretionary actions. Each discretionary requirement and restriction is adapted as follows from FDIA § 38 with appropriate modifications to suit the distinct features of credit unions in the net worth categories established by statute and those developed for "new" credit unions:

PART 702—DISCRETIONARY SUPERVISORY ACTIONS

Discretionary supervisory action	Applies in which statutory and "new" net worth categories	Comparison with FDIA § 38 and appropriateness of discretionary actions for credit unions.
1. Requiring NCUA prior approval for acquisitions, branching, new lines of business.	<i>Statutory:</i> "Undercapitalized" and lower. <i>New:</i> "Moderately Capitalized" and lower.	NCUA may prohibit a credit union "from, directly or indirectly, acquiring any interest in any CUSO or credit union, establishing or acquiring any additional branch office, or engaging in any new line of business unless the NCUA Board has approved the credit union's net worth restoration plan, the credit union is implementing its plan, and the NCUA Board determines that the proposed action is consistent with and will further the objectives of that plan." § 702.105(b)(1). This authority extends to ownership interests in a CUSO and is a discretionary supervisory action in part 702, whereas in FDIA § 38 the approval plan is a mandatory supervisory action.
2. Restricting transactions with and ownership of CUSOs.	<i>Statutory:</i> "Undercapitalized" and lower. <i>New:</i> "Moderately Capitalized" and lower.	NCUA may restrict transactions between a credit union and its wholly- or partially-owned CUSO(s), and require that credit union to reduce or divest its ownership interest in a CUSO. § 702.105(b)(2). This is an analog to FDIA § 38(f)(2)(B), which restricts a depository institution from transactions with its affiliate institutions. The authority to require a credit union to reduce or divest its ownership interest in a CUSO is appropriate because CUSO ownership can be a drain on the credit union's financial resources and attention at a time when both need to be devoted to improving net worth.
3. Restricting dividends paid.	<i>Statutory:</i> "Undercapitalized" and lower. <i>New:</i> "Moderately Capitalized" and lower.	NCUA may restrict the dividend rates a credit union pays on shares to the prevailing rates paid on comparable accounts and maturities in the region where the credit union is located, but may not apply this restriction retroactively to dividends on shares already issued. § 702.105(b)(3). This is an analog to the FDIA § 38(f)(2)(c), which imposes the same restriction on interest rates. In order not to undermine the ability of a credit union to attract new members, the rate reduction is limited to "prevailing rates paid on comparable accounts" in the region, thus permitting a credit union to remain competitive in the rates it pays.

⁹The authority to elect among conservatorship, liquidation, or other action concerning a "critically undercapitalized" credit union cannot be delegated unless the credit union has less than \$5,000,000 in assets. § 1790d(l)(4)(A). If made by delegation, the decision is directly appealable to the NCUA Board. § 1790d(i)(4)(B); § 702.107(c)(4). Finally, a "significantly undercapitalized" or "critically undercapitalized" credit union which is placed into conservatorship or liquidation under part 702

retains the right to challenge NCUA Board's decision in court within 10 days. 12 U.S.C. 1786(h)(3), 1787(a)(1)(b).

¹⁰In any event, a credit union's net worth ratio need only average 2% or more over the full calendar quarter following 18 months from the date the credit union was first classified "critically undercapitalized."

¹¹The Federal banking agencies' Joint Final Rule does not restate or establish by regulation the

"discretionary safeguards" prescribed in FDIA § 38; it merely incorporates them by general reference to the statute. See, e.g., 12 CFR 325.105(a)(2). However, FDIA § 38(b)(1)'s five capital categories and corresponding range of "leverage ratios" (the equivalent of a net worth ratio) are the same as part 702's five net worth categories and corresponding range of net worth ratios. Compare FDIA § 38(b)(1) with § 1790d(c); see e.g., 12 CFR 325.103(b).

PART 702—DISCRETIONARY SUPERVISORY ACTIONS—Continued

Discretionary supervisory action	Applies in which statutory and "new" net worth categories	Comparison with FDIA § 38 and appropriateness of discretionary actions for credit unions.
4. Prohibiting or reducing asset growth.	<i>Statutory:</i> "Undercapitalized" and lower. <i>New:</i> "Moderately Capitalized" and lower.	NCUA may place an absolute limit on increases in assets generally or on increases in a particular asset category, or may compel the credit union to reduce its total assets or a certain category of assets. § 702.105(b)(4). This is a modified version of the FDIA provision "restricting the institution's asset growth more stringently" than limiting increases in total average assets. FDIA § 38(f)(2)(D). This authority is appropriate for credit unions because it can be targeted to limit growth in one or more specific asset categories and complements the mandatory action limiting assets to total average assets. See § 702.105(a)(3).
5. Alter, reduce or terminate any activity by credit union or its CUSO.	<i>Statutory:</i> "Undercapitalized" and lower. <i>New:</i> "Moderately Capitalized" and lower.	NCUA may compel a credit union to alter, reduce or terminate any activity in which it or its CUSO engages. §§ 702.105(b)(5), 702.106(b)(5), 702.107(b)(5). This is adapted from FDIA's similar restriction, but is extended to CUSOs and is without the prerequisite that the subject activity poses "excessive risk to the institution." FDIA § 38(f)(2)(E). This is appropriate for credit unions because activities which may not be excessively risky still may distract the attention of management, compromise a CUSO's internal controls, or pose cost efficiency or conflict of interest problems—all of which can impact on net worth.
6. Prohibiting non-member deposits.	<i>Statutory:</i> "Undercapitalized" and lower. <i>New:</i> "Moderately Capitalized" and lower.	NCUA may prohibit a credit union from accepting all or certain nonmember deposits as otherwise permitted under 12 U.S.C. 1757(6) and 12 CFR 701.32. § 702.105(b)(6). This is an analog to the FDIA § 38 provision prohibiting deposits from correspondent banks. FDIA § 38(f)(2)(G). This restriction may serve a critical purpose for credit unions when large nonmember depositors are unduly influential in credit union affairs affecting its net worth.
7. Other actions to further the purpose of part 702.	<i>Statutory:</i> "Undercapitalized" and lower. <i>New:</i> "Moderately Capitalized" and lower.	NCUA may "restrict or require such other action as [it] determines will carry out the purpose of [part 702] better than any of the [discretionary] actions prescribed [for that category.]" §§ 702.106(b)(10), 702.107(b)(11). For the "undercapitalized" category only, however, "such other restriction or requirement [must be] no more severe than the [other discretionary] actions prescribed" for that category. § 702.105(b)(7). FDIA § 38(f)(2)(J) is analogous, but without the "no more severe" limitation. NCUA has added the "no more severe" limitation to ensure that in the case of an "undercapitalized" credit union—whose net worth ratio may, for example, be just tens of basis points short of "adequately capitalized"—that the least intrusive means is used to further the purpose of part 702. This is not the case with "significantly undercapitalized" and "critically undercapitalized" credit unions, who, by definition, are not near to being "adequately capitalized."
8. Ordering new election of board of directors.	<i>Statutory:</i> "Undercapitalized" and lower. <i>New:</i> "Moderately Capitalized" and lower.	As one means of improving management, NCUA may compel a credit union to hold a new election of its board of directors. § 702.105(c)(1). FDIA § 38(f)(2)(F)(i) is identical. This action is an appropriate means of improving management where the board of directors is determined to be responsible for a net worth deficiency and is either unwilling or not capable of taking action needed to correct the deficiency. NCUA intervention is minimal because a new election gives the credit union membership an opportunity to change member representation on the board of directors, possibly eliminating the need for further action by NCUA. For "undercapitalized" credit unions only, this and other means of "improving management" may be imposed only after NCUA takes one or more of the discretionary prescribed for that category (i.e., § 702.105(b)(1)–(7)) or determines that none of those actions would further the purpose of part 702. ¹² § 702.105(c). Similarly to "other actions" in paragraph 7 above, this is to ensure that the least extreme discretionary action is used in the case of a credit union whose net worth ratio may fall just short of being "adequately capitalized."
9. Dismissing directors or senior executive officers.	<i>Statutory:</i> "Undercapitalized" and lower. <i>New:</i> "Moderately Capitalized" and lower.	As a second means of improving management, NCUA may require a credit union to dismiss one or more directors or senior executive officers. § 702.105(c)(2). This action is appropriate when a surgical approach to replacing management is warranted. FDIA § 38(f)(2)(F)(ii) is identical, except that it provides a period of protection from dismissal for persons who have held office 180 or fewer days prior to the date the institution was classified "undercapitalized" or lower. The theory behind this period of protection from dismissal is that such persons have not held office long enough to be responsible for net worth problems causing the institution to be classified "undercapitalized" or lower. NCUA proposes to eliminate this period of protection so that no official who is responsible for a credit union's rapidly declining net worth, or who is incapable reversing the decline, can have a "safe harbor" from dismissal. This action is subject to the prerequisite only in the "undercapitalized" category that other discretionary actions in that category be used first or be determined not to further the purpose of part 702. Subpart L of part 747 provides a specific review procedure for dismissals pursuant to this action. 12 CFR 747.2004.
10. Employing qualified senior executive officers.	<i>Statutory:</i> "Undercapitalized" and lower. <i>New:</i> "Moderately Capitalized" and lower.	As a third means of improving management, NCUA may require the credit union to employ qualified senior executive officers, who may be subject to the NCUA Board's approval. § 702.105(c)(3). FDIA § 38(f)(2)(F)(iii) is identical. This action can be a means of supplementing existing management, or replacing a dismissed officer, with persons who are competent to deal with and to correct the causes of declining net worth. NCUA can authorize the credit union to identify and to hire a sufficiently qualified person, or NCUA may condition hiring upon its approval of the credit union's candidate. This action is subject to the prerequisite in the "undercapitalized" category only that other discretionary actions in that category be used first or be determined not to further the purpose of part 702.

PART 702—DISCRETIONARY SUPERVISORY ACTIONS—Continued

Discretionary supervisory action	Applies in which statutory and "new" net worth categories	Comparison with FDIA §38 and appropriateness of discretionary actions for credit unions.
11. Restricting senior executive officers' compensation and bonus.	<i>Statutory:</i> "Significantly Undercapitalized" and lower. <i>New:</i> "Marginally Capitalized" and lower.	NCUA may limit or reduce the compensation a credit union pays to its senior executive officers; limit, reduce, or prohibit bonuses paid to such officers; or condition payment of either compensation or a bonus upon NCUA approval. §§ 702.106(b)(7), 702.107(b)(7). FDIA § 38(f)(4)(A) is similar except that it does not authorize unilaterally limiting, reducing or prohibiting compensation or bonuses. Instead, it provides for approval by the appropriate Federal banking agency for compensation in excess of the officer's average compensation over the 12 calendar months preceding classification of the credit union as "significantly undercapitalized" or lower, and for a bonus in any amount. Such approval for either is prohibited if an institution has failed to submit an acceptable "capital restoration plan." FDIA § 38(f)(4)(B).
12. Requiring merger if grounds exist for conservatorship or liquidation.	<i>Statutory:</i> "Significantly Undercapitalized" and lower. <i>New:</i> "Marginally Capitalized" and lower.	NCUA may require a credit union to merge with another financial institution, but only if grounds exist to place the credit union into conservatorship or liquidation. § 702.106(b)(9), 702.107(b)(9). The statutory grounds for conserving or liquidating a "significantly undercapitalized" or "critically undercapitalized" credit union to facilitate prompt corrective action is whether the credit union has a reasonable prospect of becoming "adequately capitalized." 12 U.S.C. 1786(h)(1)(F), 1787(a)(3)(A)(i). FDIA § 38(f)(2)(A)(iii) is analogous, requiring an institution to be acquired by a depository institution holding company, or to combine with another depository institution if grounds exist for conservatorship or receivership. This action is appropriate for credit unions because NCUA's insistence on merger with another financial institution gives credit union management the opportunity to consummate a merger to avoid inevitable conservatorship or liquidation, thereby permitting the credit union to survive in merged form.
13. Restrict payments on uninsured secondary capital.	<i>Statutory:</i> "Critically Undercapitalized". <i>New:</i> "Minimally Capitalized" and "Uncapitalized".	NCUA may prohibit a credit union, beginning 60 days after it becomes "critically undercapitalized", from making payments of principal or interest on uninsured secondary capital." § 702.107(b)(9). This is analogous to FDIA § 38(h)(2)'s restriction on payment of principal and interest on subordinated debt. However, for Federal banking agencies that restriction is a mandatory supervisory action, whereas in part 702 it is discretionary. This restriction will have limited effect because only low-income credit unions are permitted by law to accept uninsured secondary capital. 12 U.S.C. 1757(6).
14. Require NCUA prior approval for certain actions.	<i>Statutory:</i> "Critically Undercapitalized". <i>New:</i> "Minimally Capitalized" and "Uncapitalized".	NCUA may require a credit union to obtain its approval before engaging in certain activities on the operational level, such as entering into a material transaction outside the normal course of business, amending by-laws, or changing accounting methods. § 702.107(b)(10). FDIA § 38(i) imposes a similar "prior approval" requirement which addresses the same actions and a few others not relevant to credit unions.

¹² The "prerequisite" provisions in the proposed rule—§§ 702.104(b)(7) and (c), 702.105(b)(10), 702.106(b)(10), 702.107(b)(11)—requiring certain discretionary actions to be taken before other more stringent or intrusive discretionary actions, are modeled conversely to FDIA § 38(f)(3), which establishes a "presumption in favor of certain actions" (requiring merger, restricting transactions with affiliates, and restricting interest rates) which are relatively more stringent than other available discretionary actions.

D. Alternative Prompt Corrective Action for New Credit Unions

CUMAA charged NCUA with the responsibility of developing "a system of prompt corrective action that shall apply to new credit unions" in lieu of the system of statutory PCA applicable to all other federally-insured credit unions. § 1790d(b)(2)(A). The statute defines a "new" credit union as having been in operation for less than 10 years and having \$10 million or less in assets, § 1790d(o)(4). In addition, it requires the alternative system of PCA for new credit unions to:

- Recognize that new credit unions initially have no net worth, and must be given reasonable time to accumulate net worth;
- Create adequate incentives for new credit unions to become "adequately capitalized" by the time they either are in operation for more than 10 years or reach \$10 million in total assets;
- Impose appropriate restrictions and requirements on new credit unions that

do not make sufficient progress toward becoming "adequately capitalized"; and

- Prevent evasion of the purpose of part 702.

§ 1790d(b)(2)(B).
In carrying out this mandate, the NCUA Board has relied upon two resources—comments on the topic in response to the ANPR and the advice of a "new" credit union committee assembled by NCUA for the purpose of studying field staff experience in dealing with new credit unions over the last decade. Among the members of the committee is a combined 81 years of field experience with credit unions and 10 years of private sector credit union experience.

A consensus of ANPR comments recommended that NCUA create a system of PCA for new credit unions which—

- Follows a modified "net worth category" model;
- Allows for gradual capital accumulation;

- Allows new credit unions to have no net worth in the early years;
- Sets no minimum on earnings transfers to the regular reserve; and
- Allows regulatory forbearance in imposing supervisory actions.

Based on field experience with new credit unions over the last 10 years, the "new" credit union committee made the following findings:

- The ability to accumulate capital through earnings is limited during a new credit union's early years of operation due to small asset size, the low ratio of loans to assets, and high fixed expenses;
- Historical data and field experience indicate that it takes between 3 and 5 years for a new credit union to accumulate a net worth of 2%;
- A business plan which establishes a strategy for achieving operational and financial objectives, and which is revised on an ongoing basis to reflect changing business conditions, is essential;

- A credit union which is unable to meet even modest net worth goals (established in its business plan) in its early years is unlikely to become “adequately capitalized” by the end of 10 years;
- Member business lending, although permitted for new credit unions, involves significant risks and requires a level of expertise not normally present in newly-chartered credit unions;
- Net worth categories for new credit unions should allow for gradual accumulation of net worth over 10 years; and
- Discretionary supervisory actions should be imposed commensurately with a new credit union’s failure to meet net worth goals and the consequent increase in risk of loss to the NCUSIF.

The NCUA Board believes that the system of prompt corrective action for new credit unions which it proposes in subpart B reflects the intent of CUMAA, while incorporating the recommendations of commenters and the findings of the “new” credit union committee.

1. Provisions Applicable to All New Credit Unions

Section 702.2(f) adopts the statutory definition of a “new” credit union—in operation for less than 10 years and

having \$10 million or less in assets—which determines which credit unions will be subject to the alternative system of prompt corrective action under subpart B. For purposes of subpart B, a new credit union begins “operation” when it engages in a transaction that is required by GAAP to be reflected in the credit union’s financial statement. The statutory definition significantly expands the definition in section 116 of the FCUA, which CUMAA repeals. CUMAA § 301(g)(3). The repealed provision defined a “new” credit union as having been in operation less than 4 years or having assets of less than \$500,000. 12 U.S.C. 1762(a)(2).

Subpart B augments the new statutory definition. First, it makes clear that “[a] credit union which exceeds \$10 million in total assets may become “new”, or may regain that status, “if its total assets fall below \$10 million while it is still in operation for less than 10 years.” § 702.201(b). Second, it addresses the impact of a “spin-off” of a group in determining whether the newly-formed or surviving credit union has been in operation less than 10 years. § 702.201(c). Third, it allows the NCUA Board to deny “new” status under subpart B to any credit union formed primarily to qualify as “new” for purposes of subpart A. § 702.201(d).

Subpart B incorporates by reference the general provisions of part 702 concerning measurement of net worth, notice to a new credit union of its net worth ratio and the effective date of classification in the corresponding net worth category, notice to NCUA of a change in net worth category, and adjustments to a credit union’s net worth ratio to reflect accounting adjustments. § 702.202(b) incorporating 702.3. Similarly to subpart A, subpart B provides for reclassification of new credit unions in certain net worth categories due to the existence of an unsafe or unsound condition or practice. § 702.202(d).

2. Net Worth Categories for New Credit Unions

Following the “net worth category” model of subpart A, subpart B establishes six net worth categories for new credit unions, denominated to indicate that they are building net worth anew, rather than restoring it from decline. § 702.202(c). The net worth categories, corresponding net worth ratio range for each (assuming no risk-based net worth requirement), and corresponding number of years in which a new credit union is reasonably expected, but not required, to attain each category, are depicted below:

New credit union net worth category	Net worth ratio (percent)	Expected by year-end of operation
“Well Capitalized”	7 or above	n/a
“Adequately Capitalized”	6 to 6.99	10th
“Moderately Capitalized”	3.5 to 5.99	7th
“Marginally Capitalized”	2 to 3.49	5th
“Minimally Capitalized”	0 to 1.99	3rd
“Uncapitalized”	Less than 0	n/a

In general, the net worth categories for new credit unions are designed to allow gradual accumulation of net worth over a ten year period. The “minimally capitalized” and “marginally capitalized” categories reflect the finding that it generally takes up to 3 years for a newly-chartered credit union to develop positive net worth and may take up to 5 years to attain a 2% net worth. The time frame in which a new credit union is “reasonably expected” to reach a given net worth category is a guide only, based on NCUA field experience; it does not establish a mandatory deadline nor trigger any supervisory action. Unlike subpart A, subpart B establishes an “uncapitalized” category which permits credit unions having no net worth to continue operating under limited time constraints before mandatory

supervisory action must be taken. As commenters and the “new” credit union committee have emphasized, new credit unions which eventually succeed in becoming “adequately capitalized” may suffer periods of negative net worth while striving toward that goal, particularly in the early years of operation.

Unlike subpart A, there is no downward adjustment of a new credit union’s net worth category if fails to comply with any particular supervisory action. Compare § 702.101(a)(4)(ii) with § 702.202(c)(3). However, new credit unions categorized as either “well capitalized” or “adequately capitalized,” and which meet the definition of “complex,” will be subject to a risk-based net worth requirement. § 1790d(c)(1)(A)(ii) and (c)(1)(B)(2). Like credit unions subject to subpart A, new

credit unions which do not meet the risk-based requirement in either category will be reclassified “moderately capitalized.”

3. Prompt Corrective Action for New Credit Unions by Net Worth Category

“Well Capitalized” and “Adequately Capitalized”. New credit unions classified “well capitalized” and “adequately capitalized” under subpart B are treated the same as their counterparts in subpart A. Thus, a “well capitalized” new credit union is subject to no prompt corrective action at all. An “adequately capitalized” credit union is subject to a single mandatory supervisory action—the requirement to transfer to the credit union’s regular reserve earnings equal to not less than 4/10th percent of its average total assets. § 702.203. The alternative system of

prompt corrective action subjects an "adequately capitalized" new credit union to the same supervisory action as its counterpart in subpart A in order to facilitate a smooth transition to subpart A at the end of 10 years or by the time the credit union accumulates assets of \$10 million or more.

"Moderately Capitalized," "Minimally Capitalized" and "Marginally Capitalized". Credit unions in these categories are subject to three mandatory supervisory actions which are similar to those which apply to credit unions categorized "undercapitalized" or lower in subpart A. The first is the requirement to annually transfer earnings to its regular reserve; however, for new credit unions there is no required minimum percentage of average total assets to determine the amount to be transferred. § 702.204(a)(1). The second is the restriction on increasing the credit

union's total amount of member business loans until the credit union becomes "adequately capitalized" unless it qualifies under 12 U.S.C. 1757a(b) for any of the exemptions from the statutory maximum on member business loans.¹³ § 702.204(a)(3). Third, each time a credit union fails to timely meet the net worth goals prescribed in its current approved business plan, it must submit a revised business plan to the NCUA Board for approval and implementation. § 702.204(a)(2). Because new credit unions in these categories are not restoring net worth, but are building it, they are not required to submit Net Worth Restoration Plans.

In both subparts A and B, a credit union is subject to mandatory and discretionary supervisory actions when it becomes classified "undercapitalized" or lower under subpart A or "moderately capitalized" or lower under subpart B. Under subpart A, a

credit union also becomes subject to discretionary supervisory actions according to its classification among those net worth categories. Under subpart B, however, NCUA's authority to impose discretionary supervisory actions upon a new credit union is triggered by the failure to meet a net worth goal prescribed in the credit union's then-current business plan. § 702.204(b). In that event, the credit union becomes obligated to comply with the mandatory supervisory action requiring it to submit a revised business plan to NCUA for approval (which will set new net worth goals and timetables). NCUA then is authorized to impose one or more of discretionary supervisory actions according to the new credit union's net worth category, which incorporates as follows the discretionary actions in its corresponding statutory net worth category:

If a new credit union is classified	It is subject to the same discretionary actions as a credit union in subpart A classified as	Subpart A section No. incorporated by reference
"Moderately Capitalized"	"Undercapitalized"	702.105(b)-(c)
"Marginally Capitalized"	"Significantly Undercapitalized"	702.106(b)
"Minimally Capitalized"	"Critically Undercapitalized"	702.107(b)
"Uncapitalized"	"Critically Undercapitalized"	702.107(b)

Whereas a net worth restoration plan under subpart A is designed to restore net worth, the NCUA Board has developed the revised business plan (RBP) under subpart B to build net worth. While an RBP shares similar submission and decision deadlines and criteria for approval with an NWRP, the required contents of an RBP is broader in scope. First, the RBP calls for the credit union to progressively update the business plan elements originally required for charter approval, and to revise them as warranted by circumstances and experience since the date of charter. § 702.208(b)(1). Second, among other information, the RBP must specify the amount of earnings the credit union will transfer to its regular reserve (in view of the fact that subpart B sets no minimum) and establish at least quarterly targets for increasing net worth in each year in which the RBP is in effect. § 702.208(b)(2). Approval of RBP is effectively a charter to operate for the period covered by the plan.

Finally, as with a "significantly undercapitalized" credit union under subpart A, subpart B gives the NCUA

Board discretion to place the credit union into conservatorship or liquidation pursuant to 12 U.S.C. §§ 1786(h)(1)(F), 1787(a)(3)(A)(i), if there is no reasonable prospect that the credit union will become "adequately capitalized." § 702.204(c). Providing conservatorship and liquidation as an option is consistent with the purpose of prompt corrective action. Regardless of a new credit union's inadequate net worth at present, it should be allowed to survive under prompt corrective action if there is a reasonable prospect that it will be "adequately capitalized" by the time it is in operation for 10 years. Conversely, when a new credit union has no prospect of eventually becoming "adequately capitalized," it is consistent with the purpose of prompt corrective action to prevent that credit union from exposing the NCUSIF to greater risk of loss.

"Uncapitalized". The net worth classification of "uncapitalized" is designed to permit a new credit union to periodically and temporarily operate while having negative net worth. As commenters and NCUA's "new" credit

union committee suggested, new credit unions which eventually become "adequately capitalized" may, while striving toward that goal, suffer periods when they have no net worth, particularly in the early years of operation. In view of this reality, the proposed rule treats a new credit union which is "uncapitalized" when it commences operating differently than one which subsequently declines from a higher net worth category to "uncapitalized."

A new credit union which is classified "uncapitalized" when it commences operating need only adhere to the requirements and net worth goals set forth in its initial business plan, approved at the time its charter was granted. That business plan (in the required pro-forma financial statement) may set quite modest net worth goals, allowing the credit union to remain "uncapitalized" for a substantial period. The authority to impose discretionary supervisory actions under section 702.207(b) is triggered only when the credit union fails to meet those net worth goals (as is the mandatory

¹³The NCUA Board will consider, for "new" credit unions only, whether to narrow the restriction on increasing members business loans to the origination of such loans. In that even, a "new"

credit union would be prohibited from increasing member business loans which it originates, but would not necessarily be prohibited from participating in member business loans originated

by another credit union which has expertise in originating such loans.

supervisory action requiring the credit union to file a revised business plan).

A new credit union classified in a net worth category above "uncapitalized," which declines to that category from a higher one may continue operating, but is required (like other less than "adequately capitalized" credit unions) both to transfer earnings to its regular reserve and to not increase the total amount of member business loans. § 702.207(a)(1) and (3). However, within a period of time set by the NCUA Board, but not to exceed 90 days from the date the credit union declined to "uncapitalized," the credit union must submit an RBP which provides for alternative means of funding the credit union's earnings deficit. § 702.207(a)(2). If the credit union fails to submit an RBP within the time prescribed by the NCUA Board, the credit union may be liquidated. § 702.207(c)(1). If the credit union remains "uncapitalized" 90 calendar days following approval of that RBP, the proposed rule requires the NCUA Board to liquidate the credit union. § 702.207(c)(2). The credit union can avoid mandatory liquidation at this point, however, only if it documents to the NCUA Board's satisfaction that it still is viable and has a reasonable prospect of becoming "adequately capitalized." *Id.*

4. Incentives for New Credit Unions

Apart from regulatory forbearance in imposing discretionary supervisory actions, the NCUA Board proposes three types of incentives for new credit unions to become "adequately capitalized" before they are either in operation for more than 10 years or reach \$10 million in total assets. § 1790d(b)(2)(B).¹⁴ The first two of these incentives can be funded under 12 U.S.C. 1766(f)(2)(A) and (i)(3). First, NCUA will offer training in management, lending and product development for directors, officers and employees of new credit unions. § 702.209(a). This is envisioned as classroom training to generally educate officials in matters of importance to a new credit union's long-term survival. This training may commence before a new credit union begins operating and should continue as needed.

Second, NCUA will offer individualized guidance and training to directors, officers and employees of new credit unions in the preparation and revision of business plans. § 702.209(b). The purpose of this incentive is to build

the skills within the credit union that are needed to revise business plans as required under subpart B, so that credit union management eventually is able to do so without assistance. Therefore, this incentive will consist neither of classroom training on the one hand, nor of engaging an outside consultant to perform the service of revising the business plan for the credit union, on the other hand. Instead, an expert on business plans will be engaged to work on-site with credit union management to revise the credit union's individual business plan. This experience should build the skills of credit union management in addressing, through the credit union's business plan, the causes of its inability to improve net worth.

Third, a new credit union will be eligible to join and receive the benefits of NCUA's Small Credit Union Program. § 702.209(c). Under this program, an economic development specialist will be assigned at the Regional level to train and serve as a mentor to officials and management, and to advise and assist in areas such as—

- Arranging to receive mentoring by another credit union or trade association;
 - Interacting with community organizations, trade associations, and other government agencies that may impact the credit union;
 - Expanding fields of membership, where appropriate;
 - Developing requests for financial assistance; and
 - Developing and preparing business plans, capitalization plans, and marketing plans, Call Reports, financial statements and other reports.
- NCUA Instruction no. 6052.00 (March 24, 1999) at 3–4.

E. Reserve Requirements To Conform to Prompt Corrective Action

Subpart C retains much of the substance of the current reserve transfer and dividend payment, modified to reflect the repeal of FCUA § 116, 12 U.S.C. 1762, and to conform with the requirements imposed by CUMAA. The "statutory reserve" requirement has been eliminated as inconsistent with CUMAA. The allowance for loan losses will no longer be combined with the regular reserve, and the subsequent reversing of the current period provision will no longer be allowed. The segregated regular reserve is retained in a form that comports with the earnings retention requirement in subparts A and B, and without noted adjustments. § 702.301(b). Reserve transfers continue to be reflected in the regular reserve account. § 702.301(c).

Provisions of full and fair disclosure are retained in a revised form. § 702.302. Subpart C addresses implementation of full and fair disclosure but excludes references to NCUA's Accounting Manual for Federal Credit Unions. § 702.301(b). Further, subpart C omits terms which may have suggested that proper full and fair disclosure implementation requires audited financial statements. *Id.*

The requirement to maintain an allowance for loan losses was retained for credit unions regardless of asset size. § 702.302(d). The allowance must provide for estimates of existing probable losses inherent in the loan portfolio. § 702.302(d)(2). The descriptive language was revised to reflect current guidance under Generally Accepted Accounting Principles.

The restriction on the payment of dividends was retained in substance. Amended language was added to address instances in which dividend payments cannot be made because credit union operations, allowance estimates, and/or reserve transfer requirements create a deficit condition in undivided earnings. § 702.303(a). In that event, subpart C provides that only a credit union classified "well capitalized" may transfer of funds from its regular reserve to undivided earnings to pay dividends, provided that doing so will not cause the credit union to decline from "well capitalized." § 702.303(b)(1). Credit unions which can not meet these conditions may pay dividends from funds transferred from the regular reserve only with the permission of the appropriate Regional Director. § 702.303(b).

Finally, as with current section 702, subpart C will apply to State-as well as federally-chartered credit unions as provided under 12 CFR 741.3(a)(2).

F. Issuance, Review and Enforcement of Directives Imposing Prompt Corrective Action

Subpart L of part 747 establishes the means to challenge discretionary supervisory actions imposed by NCUA under authority of part 702. 12 C.F.R. 747.2001 *et seq.* CUMAA provides that "material supervisory determinations, including decisions to require prompt corrective action, made * * * by [NCUA] officials other than the [NCUA] Board may be appealed to the [NCUA] Board" through an independent appellate process required under 12 U.S.C. 4806(a)–(b), or "pursuant to separate procedures prescribed by regulation." § 1790d(k). The NCUA Board established a Supervisory Review Committee to fulfill the requirements of

¹⁴ Once chartered and in operation, a new credit union is eligible to receive special assistance under FCUA § 208, 12 U.S.C. 1788, "to prevent the closing of an insured credit union which the Board has determined is in danger of closing."

§ 4806,¹⁵ but has concluded that a more expeditious process is needed to facilitate prompt corrective action. Therefore, the proposed rule incorporates, by regulation, the substance of the Federal banking agencies' procedure for giving notice and an opportunity to respond before issuing a directive imposing prompt corrective action. See, e.g., 12 C.F.R. 308.201. For purposes of section 747.2002, NCUA staff decisions to impose discretionary supervisory actions under subpart A or B of part 702 are considered material supervisory decisions. § 747.2001(a).

Notice, opportunity to respond, and review of directive. Under section 747.2002, the NCUA Board must generally give advance notice to a credit union when it intends to issue a directive imposing a discretionary supervisory action. § 747.2002(a)(1). Such a directive may take effect immediately only when necessary to further the purpose of prompt corrective action. § 747.2002(a)(2). The credit union may then respond, explaining why the proposed action is not appropriate and requesting that the directive not be issued or be modified. § 747.2002(c). However, the credit union is not entitled to a hearing, nor does § 4806 require the opportunity to have one. The NCUA Board may then decide not to issue the directive or to issue it as proposed or as modified. § 747.2002(d). The NCUA Board's decision is final. Under this procedure, a credit union which already is subject to a discretionary supervisory action may request reconsideration of a directive due to changed circumstances. § 747.2002(f).

Review of reclassification to lower category. CUMAA requires the NCUA Board to exercise its authority to reclassify a credit union on safety and soundness grounds "under regulations comparable to [FDIA § 38(g)]." § 1790d(h)(1). That provision requires that an institution may be reclassified on safety and soundness grounds only after "notice and an opportunity for hearing." FDIA § 38(g)(1). To that end, the NCUA Board has adopted in section 747.2003 a version of the Federal banking agencies' procedure for notice of proposed reclassification and an opportunity to respond and to request a hearing. See, e.g., 12 C.F.R. 308.202. This procedure applies to

reclassification pursuant to section 702.101(b) or 702.202(d) of part 702.

Under section 747.2003, the NCUA Board must give notice of its intention to reclassify a credit union, or to treat it as if it were the next lower net worth category, on safety and soundness grounds. § 747.2003(a). The notice must include reasons for the reclassification. § 747.2003(a)(2)(i). The credit union may then respond, explaining why it is not in an unsafe or unsound condition or has not corrected an unsafe or unsound practice and providing evidence to support its position. § 747.2003(a)(3). The credit union also may request a hearing and the opportunity to present witnesses at the hearing. § 747.2003(a)(4).

If requested, a hearing shall be held before a presiding officer designated by the NCUA Board, but shall not be a formal adjudication subject to the Administrative Procedure Act, 5 U.S.C. 554-557, nor to the Uniform Rules of Practice and Procedure, 12 C.F.R. 747.1. § 747.2003(a)(5) and (6)(A). At the hearing, the credit union may introduce relevant documents, present oral argument, and if authorized, present witnesses. § 747.2003(a)(6)(i). At the close of the hearing the presiding officer shall make a recommended decision to the NCUA Board, § 747.2003(a)(7), and the NCUA Board shall then decide whether to reclassify the credit union. § 747.2003(a)(8). The decision of the NCUA Board is final. Apart from appointing a presiding officer to conduct a hearing and to recommend a decision, the NCUA Board may not delegate its authority to reclassify a credit union. § 747.2003(c); § 1790d(h)(2). Under this procedure, a credit union which has been reclassified may seek reconsideration. § 747.2003(b).

Review of dismissal of director or officer. FDIA § 38 requires that a director or senior executive officer dismissed pursuant to a discretionary supervisory action "may obtain review of that order by filing a written petition for reinstatement. * * *" FDIA § 38(n). In order to give directors and senior officers dismissed under part 702 a comparable opportunity for review, the NCUA Board has adopted in section 747.2004 of this subpart a procedure similar to that developed by the Federal banking agencies. See, e.g., 12 C.F.R. § 308.203.

Under section 747.2004, when the NCUA Board directs the credit union to

dismiss a director or senior executive officer, it must also serve that person with a copy of the directive.

§ 747.2004(a). The affected person may then file a written request for reinstatement,¹⁶ which may include a request for an informal hearing before the NCUA Board and the opportunity to present witness testimony at the hearing. § 747.2004(b). The dismissal shall remain in effect while the request for reinstatement is pending. § 747.2004(b)(3).

Under section 747.2004, the procedure for conducting an informal hearing before a presiding officer designated by the NCUA Board is identical to that which section 747.2003 provides in cases of reclassification, except as follows. First, the affected person may appear at the hearing through counsel if he or she wishes. § 747.2004(d)(1). Second, the affected person bears the burden of proving that his or her continued employment would materially strengthen the credit union's ability to become "adequately capitalized" or to correct an unsafe or unsound condition, as the case may be. § 747.2004(e). Third, if the NCUA Board, after hearing, denies reinstatement, it must provide reasons for its action. § 747.2004(g). The NCUA Board's decision is final.

Enforcement of supervisory actions. CUMAA amended the FCUA to ensure that supervisory actions imposed under part 702 to facilitate prompt corrective action are enforceable. 12 U.S.C. §§ 1786(k)(1) and (2)(A). When a credit union fails to comply with a directive imposing a discretionary requirement or restriction, the NCUA Board may apply to the appropriate U.S. District Court to enforce that directive. § 747.2005(a). Alternatively, the NCUA Board may assess a civil money penalty against a credit union (and any institution affiliated party acting in concert with it) which violates or fails to comply with a directive, or fails to implement an approved net worth restoration plan under subpart A or revised business plan under subpart B. § 747.2005(b). Finally, subpart L allows the NCUA Board to enforce a directive under part 702 "through any other judicial or administrative proceeding authorized by law." § 747.2005(c).

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¹⁵ See Interpretive Ruling and Policy Statement 95-1, 60 FR 14795 (March 20, 1995).

¹⁶ The credit union which was directed to dismiss a director or officer may not seek reinstatement of the dismissed director or officer under section

747.2004, but that credit union may challenge the directive under § 747.2002.

Appendix A: Statutory Prompt Corrective Action

		<i>"Well Capitalized"</i> NWR: 7% or greater	<i>"Adequately Capitalized"</i> NWR: 6% to 6.99%	<i>"Undercapitalized"</i> NWR: 4.5% to 5.99%	<i>"Significantly Undercapitalized"</i> NWR: 2% to 3.99%	<i>"Critically Undercapitalized"</i> NWR: 0% to 1.99%
1	Subject to risk-based net worth requirement for "complex" credit unions					
2	If NWR is less than 5%, reclassify to next lower category if no NWRP filed					
3	Reclassify to next lower category on safety and soundness grounds*					
Mandatory Actions by Credit Unions						
4	Earnings transfer to regular reserve no less than 4/10ths% of assets					
5	Submit New Worth Restoration Plan (NWRP)					
6	NCUA assistance in preparing NWRP if assets less than \$10 million					
7	Restrict assets to average total assets over preceeding 12 months					
8	Restrict member business loans unless primarily making such loans					
Discretionary Actions By NCUA						
9	NCUA approval for acquisitions, branching, new lines of business					
10	Restrict transactions with and ownership of CUSOs					
11	Restrict dividends paid on shares					
12	Prohibit or reduce asset growth					
13	Alter, reduce, or terminate any activity					
14	Prohibit nonmember deposits					
15	Other action no more severe than rows 9 through 14					
16	Other actions to further purpose of PCA					
17	New election of board of directors					
18	Dismiss directors or senior executive officers *					
19	Employ qualified officers					
20	Restrict senior executive officers pay and benefits					
21	NCUA approval for certain actions					

* = Subject to notice and hearing under subpart L of 747.

**Appendix A:
Statutory Prompt Corrective Action**

		"Well Capitalized" NWR: 7% or greater	"Adequately Capitalized" NWR: 6% to 6.99%	"Undercapitalized" NWR: 45% to 5.99%	"Significantly Undercapitalized" NWR: 2% to 3.99%	"Critically Undercapitalized" NWR: 0% to 1.99%
22	Restrict payments on uninsured secondary capital					
23	Require merger if grounds for conservatorship or liquidation					
<u>Conservatorship and Liquidation</u>						
24	Discretionary conservatorship or liquidation if no prospect of becoming "adequately capitalized"					
25	Mandatory conservatorship, liquidation or corrective action in lieu within 90 days					
26	Mandatory liquidation after 18 months (if exceptions not met)					

* = Subject to notice and hearing under subpart L of 747.

**Appendix B:
Prompt Corrective Action
for "New" Credit Unions**

		"Well Capitalized" NWR: 7% or greater	"Adequately Capitalized" NWR: 6% to 6.99%	"Moderately Capitalized" NWR: 3.5% to 5.99%	"Marginally Capitalized" NWR: 2% to 3.49%	"Minimally Capitalized" NWR: 0% to 1.99%	"Uncapitalized" NWR: Less than 0%
1	Subject to risk-based net worth requirement for "complex" credit unions						
2	Reclassify to next lower category for lack of safety and soundness *						
Mandatory Actions by Credit Unions							
3	Earnings transfer to regular reserves no less than 4/10ths% of assets						
4	Earnings transfer to regular reserves - no minimum						
5	Restrict member business loans unless primarily making such loans						
Discretionary Actions By NCUA							
6	NCUA approval for acquisitions, branching, new lines of business						
7	Restrict transactions with and ownership of CUSOs						
8	Restrict dividends paid on shares						
9	Prohibit or reduce asset growth						
10	Alter, reduce, or terminate any activity						
11	Prohibit nonmember deposits						
12	Other action no more severe than rows 6 through 11						
13	Other actions to further purpose of PCA						
14	New election of board of directors						
15	Dismiss directors or senior executive officers *						
16	Employ qualified officers						
17	Restrict senior executive officers pay and benefits						
18	NCUA approval for certain actions						
19	Restrict payments on uninsured secondary capital						

* = Subject to notice and hearing under subpart L of 747.

**Appendix B:
Prompt Corrective Action
for "New" Credit Unions**

		"Well Capitalized" NWR: 7% or greater	"Adequately Capitalized" NWR: 6% to 6.99%	"Moderately Capitalized" NWR: 3.5% to 5.99%	"Marginally Capitalized" NWR: 2% to 3.49%	"Minimally Capitalized" NWR: 0% to 1.99%	"Uncapitalized" NWR: Less than 0%
20	Require merger if grounds for conservatorship or liquidation						
Conservatorship and Liquidation							
21	Discretionary conservatorship or liquidation if no prospect of becoming "adequately capitalized"						
"New" Credit Unions Only							
23	Submit revised business plan (RBP) when net worth goals not met or CU declines to "critically undercapitalized"						
23	Mandatory liquidation within 90 days of approval of RBP unless viable and has prospect of becoming "adequately" capitalized						
24	Eligible for NCUA-provided management training						
25	Eligible for NCUA-provided individualized guidance in preparing RBP						
26	Eligible to receive benefits of Small Credit Union Program						

* = Subject to notice and hearing under subpart L of 747.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis describing any significant economic impact a proposed regulation may have on a substantial number of small credit unions (primarily those under \$1 million in assets). The NCUA Board has determined and certifies that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small credit unions. Thus, a Regulatory Flexibility Analysis is not required.

Paperwork Reduction Act

NCUA has determined that five requirements of the proposed rule constitute collections of information under the Paperwork Reduction Act. The requirements are: (1) To provide written notice to the regional director and state supervisory authority, if appropriate, of a change to the credit union's net worth ratio that places the credit union in a lower net worth category; (2) To submit a net worth restoration plan if the credit union is undercapitalized, significantly undercapitalized, or critically undercapitalized; (3) To submit a revised net worth restoration plan when the initial plan is not approved; (4) For new credit unions, to submit a revised business plan; and (5) For new credit unions, to submit a new revised business plan when the revised business plan is not approved. NCUA is submitting a copy of the proposed regulation to the Office of Management and Budget (OMB) for its review.

NCUA estimates that 500 federally insured credit unions would have to prepare a notice to the regional director and state supervisory authority of a change to the credit union's net worth ratio. It is expected that this would take 1 hour per year, resulting in a total burden of 500 hours. NCUA estimates that 300 federally insured credit unions would be required to submit a net worth restoration plan, and each plan would require an average of 60 hours to prepare, resulting in 18,000 burden hours. NCUA further estimates that 30 federally insured credit unions' initial plans would not be approved, requiring an additional burden of 30 hours each and a total of 900 burden hours. NCUA estimates 50 new federally insured credit unions would be required to submit a revised business plan, and each plan would require an average of 80 hours to prepare, for a total burden of 4,000 hours. NCUA further estimates that 10 new federally insured credit unions' plans would not be approved,

requiring an additional burden of 40 hours each, for a total of 400 hours. In total, the burden created by the proposed rule is 23,800 hours. It is NCUA's view that the additional requirements are necessary for affected federally insured credit unions to adequately address the net worth requirements of the proposed rule.

The Paperwork Reduction Act of 1995 and OMB regulations require that the public be provided an opportunity to comment on information collection requirements, including an agency's estimate of the burden of the collection of information. The NCUA Board invites comment on: (1) whether the collection of information is necessary; (2) the accuracy of NCUA's estimate of the burden of collecting the information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collection of information. Comments should be sent to: OMB Reports Management Branch, New Executive Office Building, Room 10202, Washington, D.C. 20503; Attention: Alex T. Hunt, Desk Officer for NCUA. Please send NCUA a copy of any comments you submit to OMB.

Executive Order 12612

Executive Order 12612 requires NCUA to consider the effect of its actions on state interests. As prescribed by CUMAA, part 702 applies to all federally-insured credit unions, including federally-insured, State-chartered credit unions. Accordingly, it may have a direct effect on the States, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This impact is an unavoidable consequence of carrying out the statutory mandate to adopt a system of prompt corrective action for federally-insured credit unions.

Agency Regulatory Goal

NCUA's goal is clear, understandable regulations that impose a minimal regulatory burden. Although much of the language of this rule is mandated by Congress, we request your comments on whether the proposed rule is understandable and minimally intrusive if implemented as proposed.

List of Subjects

12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 747

Administrative practices and procedures, Credit unions.

By the National Credit Union Administration Board on May 3, 1999.

Becky Baker,

Secretary of the Board.

Accordingly, it is proposed that 12 CFR, parts 702 and 747 be amended as set forth below:

Part 702 is revised to read as follows:

PART 702—PROMPT CORRECTIVE ACTION

Sec.

- 702.1 Authority, purpose, scope, and other supervisory authority.
- 702.2 Definitions.
- 702.3 Measure, notice and effective date of net worth classification.

Subpart A—Statutory Prompt Corrective Action

- 702.101 Statutory net worth categories.
- 702.102 Complex credit unions defined [Reserved].
- 702.103 Risk-based net worth requirements for complex credit unions [Reserved].
- 702.104 Prompt corrective action for "adequately capitalized" credit unions.
- 702.105 Prompt corrective action for "undercapitalized" credit unions.
- 702.106 Prompt corrective action for "significantly undercapitalized" credit unions.
- 702.107 Prompt corrective action for "critically undercapitalized" credit unions.
- 702.108 Consultation with State officials on proposed prompt corrective action.
- 702.109 Net worth restoration plans.

Subpart B—Alternative Prompt Corrective Action for New Credit Unions

- 702.201 Scope and definition.
- 702.202 Net worth categories for new credit unions.
- 702.203 Prompt corrective action for "adequately capitalized" new credit unions.
- 702.204 Prompt corrective action for "moderately capitalized" new credit unions.
- 702.205 Prompt corrective action for "marginally capitalized" new credit unions.
- 702.206 Prompt corrective action for "minimally capitalized" new credit unions.
- 702.207 Prompt corrective action for "uncapitalized" new credit unions.
- 702.208 Revised business plans for new credit unions.
- 702.209 Incentives for new credit unions.

Subpart C—Reserves

- 702.301 Reserves
- 702.302 Full and fair disclosure of financial condition.
- 702.303 Payment of dividends.

Authority: 12 U.S.C. 1766(a), 1790d.

§ 702.1 Authority, purpose, scope, and other supervisory authority.

(a) *Authority.* This part (except for subpart C) and subpart L of part 747 of this chapter are issued by the National

Credit Union Administration pursuant to section 216 of the Federal Credit Union Act (FCUA), 12 U.S.C. 1790d (section 1790d), as added by section 301 of the Credit Union Membership Access Act, Public Law 105-219, 112 Stat. 913 (1998). Subpart C of this part is issued pursuant to FCUA section 120, 12 U.S.C. 1766.

(b) *Purpose.* The express purpose of prompt corrective action under section 1790d is to resolve the problems of federally-insured credit unions at the least possible long-term loss to the National Credit Union Share Insurance Fund. This part carries out the purpose of prompt corrective action by establishing a framework of supervisory requirements and restrictions designed to restore and improve the capital levels of federally-insured credit unions according to a credit union's net worth ratio.

(c) *Scope.* This part implements the provisions of section 1790d as they apply to federally-insured credit unions, whether federally- or state-chartered; to such credit unions defined as "new" pursuant to 12 U.S.C. 1790d(b)(2); and to such credit unions defined as "complex" pursuant to 12 U.S.C. 1790d(d). Certain of these provisions also apply to officers and directors of federally-insured credit unions. This Part does not apply to corporate credit unions. Procedures for issuing, reviewing and enforcing orders and directives issued under this part are set forth in subpart L of Part 747 of this chapter, 12 CFR 747.2001.

(d) *Other supervisory authority.* Neither FCUA section 1790d nor this Part in any way limits the authority of the NCUA Board under any other provision of law to take additional supervisory actions to address unsafe or unsound practices or conditions, or violations of applicable law or regulations. Action taken under this part may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the NCUA Board, including issuance of cease and desist orders, orders of prohibition, suspension and removal, or assessment of civil money penalties, or any other actions authorized by law.

§ 702.2 Definitions.

Except as provided below, the terms used in this part have the same meanings as set forth in FCUA sections 101 and 216, 12 U.S.C. 1752, 1790d.

(a) *Appropriate State official* means the commission, board or other supervisory authority having jurisdiction over credit unions chartered by the State which chartered the affected credit union.

(b) *Credit union* means a federally-insured, federally-chartered or State-chartered, unless otherwise indicated.

(c) *CUSO* means a credit union service organization defined for purposes of this part as a legal entity established under state law, which is owned in whole or in part by one of more federally-insured credit unions (including a state-chartered credit union) and which—

(1) Provides services associated with the routine operations of credit unions; or

(2) Engages in activities incidental to the conduct of a credit union; or

(3) Engages in activities that further or facilitate the purposes of a credit union; or

(4) Furnishes services to a credit union.

(d) *NCUSIF* means the National Credit Union Share Insurance Fund as defined by 12 U.S.C. 1783.

(e) *Net worth* means the retained earnings balance of the credit union as determined under generally accepted accounting principles. With respect to a credit union designated low-income (as defined in 12 U.S.C. 1757(6)), net worth includes secondary capital accounts that are uninsured and subordinate to all other claims against the low-income credit union, including the claims of creditors, shareholders and the NCUSIF.

(f) *Net worth ratio* means, with respect to a credit union, the ratio of the net worth of the credit union to the total assets of the credit union.

(g) *New credit union* means a federally-insured credit union which both has been in operation for less than ten (10) years and has \$10,000,000 or less in total assets.

(h) *Shares* means insured shares as defined in 12 CFR 741.4(b)(2).

(i) *Total assets* means the average of the total assets reported (including those that reasonably should be reported) by the credit union on the line entitled "TOTAL ASSETS" on its most recent four (4) quarterly Call Reports, or for a semi-annual filer, on its most recent two (2) semi-annual Call Reports.

§ 702.3 Measures, notice and effective date of net worth classification.

(a) *Net worth measures.* For purposes of this part, a credit union's net worth category classification will be determined by two measures:

(1) The net worth ratio as defined in § 702.2(f); and

(2) The risk-based net worth requirement applicable to a credit union defined as "complex" under § 702.102.

(b) *Notice and effective date of net worth classification.* For purposes of this part, a federally-insured credit

union shall have notice of its net worth ratio (including any applicable risk-based net worth requirement) and shall be classified within the corresponding net worth category as of the earliest to occur of:

(1) The last day of the credit union's most recent dividend period for regular shares, but no less frequently than quarterly; or

(2) The date the credit union received its most recent final report of examination; or

(3) The date the credit union received written notice from the NCUA Board or, if State-chartered, the appropriate State official of reclassification based on safety and soundness grounds as provided under §§ 702.101(b) and 702.202(d) of this part, or of an adjustment to its net worth ratio as provided under paragraph (d) of this section.

(c) *Notice by credit union of change in net worth category.* A federally-insured credit union shall provide written notice to the NCUA Board and, if State-chartered, to the appropriate State official, of a change in its net worth ratio that places the credit union in a lower net worth category no later than 15 calendar days after the effective date of the change as determined under paragraphs (b) (1) and (2) of this section. Written notice to the NCUA Board shall be deemed effective if it is delivered to the appropriate Regional Director and, if State-chartered, to the appropriate State official. Failure to provide such notice to the NCUA Board within 15 calendar days, or failure to provide such notice altogether, in no way alters the effective date of a change of net worth classification under this subparagraph, nor the affected credit union's legal obligations under this part.

(d) *Adjustment of net worth ratio.* To effectuate and further the purpose of this part, the NCUA Board and, in the case of a State-chartered credit union, the NCUA Board or appropriate State official, may adjust a credit union's net worth ratio to reflect the impact of accounting adjustments made for items of "other comprehensive income" such as accumulated unrealized gains and losses on available-for-sale securities when the failure to do so would overstate or understate the credit union's net worth ratio, thereby either permitting it to evade appropriate prompt corrective action or subjecting it to unwarranted prompt corrective action.

Subpart A—Statutory Prompt Corrective Action**§ 702.101 Statutory net worth categories.**

(a) *Net worth categories.* Except for credit unions defined as “new” under subpart B of this part, a federally-insured credit union shall be classified—

(1) *Well capitalized* if it has a net worth ratio of seven percent (7%) or greater and also meets any applicable risk-based net worth requirement under § 702.102;

(2) *Adequately capitalized* if it has a net worth ratio of six percent (6%) or more but less than seven percent (7%), and also meets any applicable risk-based net worth requirement under § 702.102;

(3) *Undercapitalized* if it has a net worth ratio of four percent (4%) or more but less than six percent (6%), or fails to meet any applicable risk-based net worth requirement under § 702.102;

(4) *Significantly undercapitalized* if it:

- (i) Has a net worth ratio of two percent (2%) or more but less than four percent (4%); or
- (ii) Has a net worth ratio of two percent (2%) or more but less than five percent (5%), and either—
 - (A) Fails to submit an acceptable net worth restoration plan within the time prescribed in section 702.109; or
 - (B) Materially fails to implement a net worth restoration plan accepted by the NCUA Board;

(5) *Critically undercapitalized* if it has a net worth ratio of less than two percent (2%).

(b) *Reclassification based on supervisory criteria other than net worth.* The NCUA Board may reclassify a “well capitalized” credit union as “adequately capitalized” and may require an “adequately capitalized” or “undercapitalized” credit union to comply with certain mandatory or discretionary supervisory actions as if it were in the next lower net worth category (each of such actions hereinafter referred to generally as “reclassification”) in the following circumstances:

(1) *Unsafe or unsound condition.* The NCUA Board has determined, after notice and opportunity for hearing pursuant to § 747.2003 of this chapter, that the credit union is in an unsafe or unsound condition; or

(2) *Unsafe or unsound practice.* The NCUA Board has determined, after notice and opportunity for hearing pursuant to § 747.2003 of this chapter, that the credit union had notice of, but has not corrected an unsafe or unsound practice.

(c) *Non-delegation.* The NCUA Board may not delegate its authority to reclassify a credit union under paragraph (b) of this section.

(d) *Consultation with State officials.* The NCUA Board shall seek and consider the views of the appropriate State official before reclassifying a credit union under paragraph (b) of this section.

§ 702.102 Complex credit unions defined [Reserved].**§ 702.103 Risk-based net worth requirements for complex credit unions [Reserved].****§ 702.104 Prompt corrective action for “adequately capitalized” credit unions.**

(a) *Earnings transfer.* If a federally-insured credit union becomes “adequately capitalized,” it must annually transfer to its regular reserve account earnings equivalent to not less than $\frac{4}{10}$ ths percent (0.4%) of its total assets as defined by § 702.2(i), at the following rates:

(1) In the case of a credit union having a monthly dividend period for regular shares, at a rate of at least eight and one-third percent (8.334%) per month of the annual amount; and

(2) In the case of a credit union having a quarterly, semi-annual or annual dividend period for regular shares, at a rate of at least twenty five percent (25%) per quarter of the annual amount.

(b) *Reduction in earnings transfer.* On a case-by-case basis and subject to review and revocation no less frequently than quarterly, the NCUA Board may permit the credit union to transfer an amount that is less than the equivalent of $\frac{4}{10}$ ths percent (0.4%) of its total assets, to the extent the credit union demonstrates to the NCUA Board that such lesser amount—

(1) Is necessary to avoid a significant redemption of shares; and

(2) Would further the purpose of this part.

§ 702.105 Prompt corrective action for “undercapitalized” credit unions.

(a) *Mandatory action by credit union.* If a federally-insured credit union becomes “undercapitalized,” it must immediately—

(1) *Earnings transfer.* Transfer earnings to its regular reserve account as provided in § 702.104;

(2) *Submit net worth restoration plan.* Submit a net worth restoration plan pursuant to § 702.109;

(3) *Restrict increase in assets.* Not permit the credit union’s assets to increase beyond its total assets as defined by § 702.2(i), unless—

(i) The NCUA Board has approved a net worth restoration plan which

provides for an increase in total assets; and

- (ii) The assets of the credit union are increasing consistent with the approved plan; and
- (iii) The credit union’s net worth ratio is increasing at a rate that is consistent with the approved plan;

(4) *Restrict member business loans.* Not increase the total amount of member business loans until the credit union becomes “adequately capitalized” unless it qualifies for an exception under 12 U.S.C. 1757a(b).

(b) *Discretionary action by NCUA.* Subject to the applicable procedures for issuing, reviewing and enforcing directives set forth in subpart L of part 747 of this chapter, the NCUA Board may, with respect to any “undercapitalized” credit union, or a director, officer or employee of such credit union, take one or more of the following actions, if it determines that those actions are necessary to carry out the purpose of this part:

(1) *Requiring prior approval for acquisitions, branching, new lines of business.* Prohibit a credit union from, directly or indirectly, acquiring any interest in any CUSO or credit union, establishing or acquiring any additional branch office, or engaging in any new line of business, unless the NCUA Board has approved the credit union’s net worth restoration plan, the credit union is implementing its plan, and the NCUA Board determines that the proposed action is consistent with and will further the objectives of that plan;

(2) *Restricting transactions with and ownership of CUSO.* Restrict the credit union’s transactions with a CUSO, or require the credit union to reduce or divest its ownership interest in a CUSO;

(3) *Restricting dividend paid.* Restrict the dividend rates the credit union pays on shares to the prevailing rates paid on comparable accounts and maturities in the region where the credit union is located, as determined by the NCUA Board, except that dividend rates already paid on shares acquired before imposing a restriction under this paragraph may not be retroactively restricted;

(4) *Prohibiting or reducing asset growth.* Prohibit any growth whatsoever in the credit union’s assets or in a category of assets, or require the credit union to reduce its assets or a category of assets;

(5) *Alter, reduce or terminate activity.* Require the credit union or its CUSO to alter, reduce, or terminate any activity;

(6) *Prohibiting nonmember deposits.* Prohibit the credit union from accepting all or certain nonmember deposits as

otherwise permitted under 12 U.S.C. 1757(6) and § 701.32 of this chapter, or under applicable State law;

(7) *Other action no more severe.* Restrict or require such other action by the credit union as the NCUA Board determines will carry out the purpose of this part better than any of the actions prescribed in paragraphs (b) (1) through (6) of this section, provided that such other restriction or requirement is no more severe than the actions prescribed in paragraphs (b) (1) through (6).

(c) *Prerequisite for improving management.* The NCUA Board may take any of the following actions provided that it first takes one or more of the actions prescribed in paragraphs (b) (1) through (7) of this section or determines that none of those actions would further the purpose of this part:

(1) *New election of directors.* Order a new election of the credit union's board of directors;

(2) *Dismissing directors or senior executive officers.* Require the credit union to dismiss from office any director or senior executive officer, provided however, that a dismissal under this clause shall not be construed to be a formal administrative action for removal under 12 U.S.C. 1786(g);

(3) *Employing qualified senior executive officers.* Require the credit union to employ qualified senior executive officers (who, if the NCUA Board so specifies, shall be subject to its approval).

§ 702.106 Prompt corrective action for "significantly undercapitalized" credit unions.

(a) *Mandatory action by credit union.* Immediately upon becoming "significantly undercapitalized," a federally-insured credit union must—

(1) *Earnings transfer.* Transfer earnings to its regular reserve account as provided in § 702.104;

(2) *Submit net worth restoration plan.* Submit a net worth restoration plan pursuant to § 702.109;

(3) *Restrict increase in assets.* Not permit the credit union's assets to increase beyond its total assets as defined by section 702.2(i), except as provided in § 702.105(a)(3);

(4) *Restrict member business loans.* Not increase the total amount of member business loans except as provided in § 702.105(a)(4).

(b) *Discretionary actions by NCUA.* Subject to the applicable procedures for issuing, reviewing and enforcing directives set forth in subpart L of part 747 of this chapter, the NCUA Board may, with respect to any "significantly undercapitalized" credit union, or a director, officer or employee of such

credit union, take one or more of the following actions if it determines that those actions are necessary to carry out the purpose of this part:

(1) *Requiring prior approval for acquisitions, branching, new lines of business.* Prohibit a credit union from, directly or indirectly, acquiring any interest in any CUSO or credit union, establishing or acquiring any additional branch office, or engaging in any new line of business, except as provided in § 702.105(b)(1);

(2) *Restricting transactions with and ownership of CUSO.* Restrict the credit union's transactions with a CUSO, or require the credit union to divest or reduce its ownership interest in a CUSO;

(3) *Restricting dividend paid.* Restrict the dividend rates that the credit union pays on shares as provided in § 702.105(b)(3);

(4) *Prohibiting or reducing asset growth.* Prohibit any growth whatsoever in the credit union's assets or in a category of assets, or require the credit union to reduce assets or a category of assets;

(5) *Alter, reduce or terminate activity.* Require the credit union or its CUSO(s) to alter, reduce, or terminate any activity;

(6) *Prohibiting nonmember deposits.* Prohibit the credit union from accepting all or certain nonmember deposits as otherwise permitted under 12 U.S.C. 1757(6) and § 701.32 of this chapter, or under applicable State law;

(7) *Restricting senior executive officers' compensation.* Limit or reduce payment of compensation to any senior executive officer, limit or prohibit payment of a bonus to such officer, or condition payment of compensation or a bonus to such officer upon the NCUA Board's prior approval;

(8) *Improving management.* Order a new election of board of directors; dismiss directors or senior executive officers; or employ qualified senior executives, all as provided in § 702.105(c), without the prerequisite that applies to that section;

(9) *Requiring merger.* Require the credit union to merge with another financial institution if one or more grounds exist for placing the credit union into conservatorship pursuant to 12 U.S.C. 1786(h)(1)(F), or into liquidation pursuant to 12 U.S.C. 1787(a)(3)(A)(i);

(10) *Other actions.* Restrict or require such other action by the credit union as the NCUA Board determines will carry out the purpose of this part better than any of the actions prescribed in paragraphs (b)(1) through (9) of this section.

(c) *Discretionary conservatorship or liquidation if no prospect of becoming "adequately capitalized."*

Notwithstanding any other actions required or permitted to be taken under this section, when a credit union becomes "significantly undercapitalized" (including by reclassification under § 702.101(b)), the NCUA Board may place the credit union into conservatorship pursuant to 12 U.S.C. 1786(h)(1)(F), or into liquidation pursuant to 12 U.S.C. 1787(a)(3)(A)(i), provided that the credit union has no reasonable prospect of becoming "adequately capitalized."

§ 702.107 Prompt corrective action for "critically undercapitalized" credit unions.

(a) *Mandatory action by credit union.* Immediately upon becoming "critically undercapitalized," a federally-insured credit union must—

(1) *Earnings transfer.* Transfer earnings to its regular reserve account as provided in § 702.104;

(2) *Submit net worth restoration plan.* Submit a net worth restoration plan pursuant to § 702.109;

(3) *Restrict increase in assets.* Not permit the credit union's assets to increase beyond its total assets as defined by § 702.2(i), except as provided in § 702.105(a)(3);

(4) *Restrict member business loans.* Not increase the total amount of member business loans except as provided in § 702.105(a)(4).

(b) *Discretionary actions by NCUA.* Subject to the applicable procedures for issuing, reviewing and enforcing directives set forth in subpart L of part 747 of this chapter, the NCUA Board may, with respect to any "critically undercapitalized" credit union, or a director, officer or employee of such credit union, take one or more of the following actions if it determines that those actions are necessary to carry out the purpose of this part:

(1) *Requiring prior approval for acquisitions, branching, new lines of business.* Prohibit a credit union from, directly or indirectly, acquiring any interest in any CUSO or credit union, establishing or acquiring any additional branch office, or engaging in any new line of business, except as provided by § 702.105(b)(1);

(2) *Restricting transactions with and ownership of CUSO.* Restrict the credit union's transactions with a CUSO, or require the credit union to divest or reduce its ownership interest in a CUSO;

(3) *Restricting dividend paid.* Restrict the dividend rates that the credit union pays on shares as provided in § 702.105(b)(3);

(4) *Prohibiting or reducing asset growth.* Prohibit any growth whatsoever in the credit union's assets or in a category of assets, or require the credit union to reduce assets or a category of assets;

(5) *Alter, reduce or terminate activity.* Require the credit union or its CUSO(s) to alter, reduce, or terminate any activity;

(6) *Prohibiting nonmember deposits.* Prohibit the credit union from accepting all or certain nonmember deposits as otherwise permitted under 12 U.S.C. 1757(6) and § 701.32 of this chapter, or under applicable State law;

(7) *Restricting senior executive officers' compensation.* Limit or reduce payment of compensation to any senior executive officer, limit or prohibit payment of a bonus to such officer, or condition payment of compensation or a bonus to such officer upon the NCUA Board's approval;

(8) *Improving management.* Order a new election of board of directors; dismiss directors or senior executive officers; or employ qualified senior executive officers, all as provided in § 702.105(c), but without the prerequisite required in that section;

(9) *Restrictions on payments on uninsured secondary capital.* Beginning 60 days after a credit union becomes "critically undercapitalized," prohibit payments of principal or dividends on the credit union's uninsured secondary capital accounts, except that unpaid dividends shall continue to accrue under the terms of the account to the extent permitted by law;

(10) *Requiring prior approval.* Require a "critically undercapitalized" credit union to obtain the NCUA Board's prior written approval before doing any of the following:

- (i) Entering into any material transaction other than in the usual course of business, including any investment, expansion, acquisition, sale of assets, or other similar action with respect to which the credit union is required to provide notice to the NCUA Board;
- (ii) Extending credit for transactions deemed highly leveraged by the NCUA Board or, if State-chartered, by the appropriate State official;
- (iii) Amending the credit union's charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order;
- (iv) Making any material change in accounting methods;
- (v) Paying dividends on new share accounts at a rate that would increase the credit union's weighted

average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in its normal market areas;

(11) *Other action.* Restrict or require such other action by the credit union as the NCUA Board determines will carry out the purpose of this part better than any of the actions prescribed in paragraphs (b)(1) through (10) of this section;

(12) *Requiring merger.* Require the credit union to merge with another financial institution if one or more grounds exist for placing the credit union into conservatorship pursuant to 12 U.S.C. 1786(h)(1)(F), or into liquidation pursuant to 12 U.S.C. 1787(a)(3)(A)(i).

(c) *Mandatory conservatorship, liquidation or action in lieu thereof.* (1) *Action within 90 days.* Notwithstanding any other actions required or permitted to be taken under this section (and regardless of a credit union's prospect of becoming "adequately capitalized"), the NCUA Board must, within 90 calendar days after a credit union becomes "critically undercapitalized"—

- (i) *Conservatorship.* Place the credit union into conservatorship pursuant to 12 U.S.C. 1786(h)(1)(G); or
- (ii) *Liquidation.* Liquidate the credit union pursuant to 12 U.S.C. 1787(a)(3)(A)(ii); or
- (iii) *Other corrective action.* Take other corrective action in lieu of conservatorship or liquidation to better achieve the purpose of this part, provided that the NCUA Board documents why such action in lieu of conservatorship or liquidation would do so.

(2) *Renewal of other corrective action.* A determination by the NCUA Board to take other corrective action in lieu of conservatorship or liquidation under paragraph (c)(1)(iii) of this section shall expire after an effective period ending no later than 180 calendar days after the determination is made, and the credit union shall be immediately placed into conservatorship or liquidation under paragraphs (c)(1)(i) and (ii) of this section, unless the NCUA Board makes a new determination under paragraph (c)(1)(ii) of this section before the end of the effective period of the prior determination;

(3) *Mandatory liquidation after 18 months.* (i) *Generally.* Notwithstanding paragraphs (c)(1) and (2) of this section, the NCUA Board must place a credit union into conservatorship or liquidation if it remains "critically undercapitalized" on average for a full

calendar quarter following a period of 18 months from the date on which the credit union first became "critically undercapitalized";

(ii) *Exception.* Notwithstanding paragraph (c)(3)(i) of this section, the NCUA Board may continue to take other corrective action in lieu of conservatorship or liquidation if it certifies that the credit union—

- (A) Has been in substantial compliance with an approved net worth restoration plan requiring consistent improvement in net worth since the date the net worth restoration plan was approved;
 - (B) Has positive net income or has an upward trend in earnings that the NCUA Board projects as sustainable; and
 - (C) is viable and not expected to fail.
- (4) *Nondelegation.* The NCUA Board may not delegate its authority under paragraphs (c)(1) through (3) of this section unless the credit union has less than \$5,000,000 in total assets. A credit union shall have a right of direct appeal to the NCUA Board of any decision made under this section by delegated authority.

§ 702.108 Consultation with State officials on proposed prompt corrective action.

(a) *Consultation on proposed conservatorship or liquidation.* Before placing a federally-insured State-chartered credit union into conservatorship (pursuant to 12 U.S.C. 1786(h)(1)(F) or (G)) or liquidation (pursuant to 12 U.S.C. 1787(a)(3)) as permitted or required under this part to facilitate prompt corrective action—

(1) The NCUA Board shall seek the views of the appropriate State official (as defined in § 702.2(a)), and give him or her an opportunity to place the credit union into conservatorship or liquidation;

(2) The NCUA Board shall, upon timely request of the appropriate State official, promptly provide him or her with a written statement of the reasons for the proposed conservatorship or liquidation, and reasonable time to respond to that statement;

(3) If the appropriate State official makes a timely written response that disagrees with the proposed conservatorship or liquidation and gives reasons for that disagreement, the NCUA Board shall not place the credit union into conservatorship or liquidation unless it first considers the views of the appropriate State official and determines that—

- (i) The NCUSIF faces a significant risk of loss if the credit union is not

placed into conservatorship or liquidation; and

- (ii) Conservatorship or liquidation is necessary to reduce any loss that the NCUSIF either is expected to incur or risks incurring with respect to the credit union.

(b) *Nondelegation.* The NCUA Board may not delegate any determination under paragraph (a)(3) of this section.

(c) *Notification when taking discretionary action.* The NCUA Board shall seek the views of the appropriate State official before taking any discretionary action with respect to a federally-insured State-chartered credit union, and shall allow the appropriate State official to take the proposed action independently or jointly with NCUA.

§ 702.109 Net worth restoration plans

(a) *Schedule for filing.* (1) *Generally.* A federally-insured credit union shall file a written net worth restoration plan (Plan) with the appropriate Regional Director and, if State-chartered, the appropriate State official within 45 calendar days of becoming either "undercapitalized," "significantly undercapitalized" or "critically undercapitalized," unless the NCUA Board notifies the credit union in writing that its Plan is to be filed within a different period.

(2) *Exception.* An "adequately capitalized" credit union that is required, on safety and soundness grounds under § 702.101(b), to comply with supervisory actions as if it were "undercapitalized" is not required to submit a Plan solely due to the reclassification.

(3) *Filing of additional plan.* Notwithstanding paragraph (a)(1) of this section, a credit union that has already submitted and is operating under a Plan approved under this section is not required to submit an additional Plan due to a change in net worth ratio or reclassification under § 702.101(b), unless the NCUA Board notifies the credit union that it must submit a new Plan. A credit union that is notified to submit a new or revised Plan shall file the Plan in writing with the appropriate Regional Director within 45 calendar days of receiving such notice, unless the NCUA Board notifies the credit union in writing that the Plan is to be filed within a different period.

(4) *Failure to timely file plan.* When a credit union fails to timely file a Plan pursuant to paragraph (a)(1) or (3) of this section, the NCUA Board shall promptly notify the credit union that it has failed to file a Plan and that it has 15 calendar days from receipt of that notice within which to file a Plan.

(b) *Assistance in preparing plan.* Upon timely request by a credit union having total assets of less than \$10 million (regardless how many years it has been in operation), the NCUA Board shall provide assistance in preparing a plan required to be filed under paragraph (a) of this section.

(c) *Contents of plan.* A net worth restoration plan must—

- (1) Specify—
 - (i) The steps the credit union will take to become "adequately capitalized";
 - (ii) A specific timetable for increasing net worth during each year in which the Plan will be in effect;
 - (iii) The amount of earnings equivalent to not less than 4/10ths percent (0.4%) of its total assets that the credit union will transfer to its regular reserve account under section 702.104(a), or such lesser amount as the credit union justifies to the NCUA Board under section 702.104(b);
 - (iv) How the credit union will comply with the mandatory and discretionary restrictions or requirements imposed on it under this part;
 - (v) the types and levels of activities in which the credit union will engage; and
 - (vi) if required to submit a plan due to reclassification under section § 702.101(b), the steps the credit union will take to correct the unsafe or unsound practice(s) or condition(s);

(2) Include pro forma financial statements covering the next two years;

(3) Contain such other information as the NCUA Board has required; and

(4) With respect to a credit union having assets of \$10 million or more, financial data submitted in connection with its net worth restoration plan must be prepared in accordance with generally accepted accounting principles (GAAP) unless the NCUA Board instructs otherwise.

(d) *Criteria for approval of plan.* The NCUA Board shall not accept a net worth restoration plan unless the plan—

- (1) Complies with paragraph (c) of this section;
- (2) Is based on realistic assumptions, and is likely to succeed in restoring the credit union's net worth;
- (3) Would not unreasonably increase the credit union's exposure to risk (including credit risk, interest-rate risk, and other types of risk); and
- (4) Is supported by appropriate assurances from the credit union that it will comply with the plan until it has remained "adequately capitalized" for four (4) consecutive calendar quarters.

(e) *Review of plan.* (1) *Notice of decision.* Within 60 calendar days after receiving a Plan under this part, the NCUA Board will notify the credit union in writing whether the Plan has been approved, and shall provide reasons for its decision in the event of disapproval.

(2) *Consultation with state officials.* In the case of a Plan submitted by a federally-insured State-chartered credit union, the NCUA Board shall, when evaluating the Plan, seek and consider the views of the appropriate State official.

(f) *Plan not approved.* (1) *Submission of revised plan.* If a Plan is not approved by the NCUA Board, the credit union shall submit a revised Plan within 30 calendar days of receiving notice of disapproval, unless it is notified in writing by the NCUA Board that the revised Plan is to be filed within a different period. Upon receipt of notice of disapproval of a Plan, an "undercapitalized" credit union having a net worth ratio of less than five percent (5%) shall remain subject to all of the provisions of this part applicable to "significantly undercapitalized" credit unions until a new or revised Plan submitted by the credit union is approved by the NCUA Board.

(2) *Notice of decision on revised plan.* Within 30 calendar days after receiving a revised Plan under paragraph (f)(1) of this section, the NCUA Board shall notify the credit union in writing whether the revised Plan is approved. The Board may extend the time within which notice of its decision shall be provided.

(g) *Failure to submit or implement plan.* Any "undercapitalized" credit union having a net worth ratio of less than five percent (5%) which fails to submit a written Plan within the applicable period provided in this section, or which fails in any material respect to timely implement an approved Plan, shall remain subject to all of the provisions of this part applicable to "significantly undercapitalized" credit unions.

(h) *Amendment of plan.* A credit union that has filed an approved Plan may, after prior written notice to and approval by the NCUA Board, amend its Plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the credit union shall implement the Plan as approved prior to the proposed amendment.

Subpart B—Alternative Prompt Corrective Action for New Credit Unions

§ 702.201 Scope and definition

(a) *Scope.* This subpart B applies exclusively to credit unions defined in paragraph (b) of this section as “new” pursuant to 12 U.S.C. 1790d(b)(2) in lieu of subpart A of this part.

(b) *New credit union defined.* A “new” credit union for purposes of this section is a federally-insured credit union that has both been in operation for less than ten (10) years and has total assets of not more than \$10 million. A credit union which exceeds \$10 million in total assets may become “new” if its total assets subsequently fall below \$10 million while it is still in operation for less than 10 years.

(c) *Effect of spin-offs.* A credit union formed as the result of a “spin-off” of a group from the field of membership of an existing credit union is deemed to be in operation since the effective date of the “spin-off.” A credit union whose total assets decline below \$10 million because a group within its field of membership has been “spun-off” is eligible to become “new” if it has been in operation less than 10 years.

(d) *Actions to evade statutory prompt corrective action.* If the NCUA Board determines that a credit union was formed as a result of a “spin-off,” or was expanded by merger or by the addition of a group to its field of membership, primarily to qualify as “new” under this subpart, the credit union shall be deemed subject to prompt corrective action under subpart A of this part.

§ 702.202 Net worth categories for new credit unions.

(a) *Net worth measures.* For purposes of this part, a new credit union’s net worth category classification will be determined by its net worth ratio as defined in § 702.2(f), and any risk-based net worth requirement applicable to a new credit union defined as “complex” under § 702.102.

(b) *Notice and effective date of net worth classification of new credit union.* A new federally-insured credit union shall have notice of its net worth ratio (including any applicable risk-based net worth requirement), and shall be classified within the corresponding net worth category under this subpart, effective as provided in § 702.3(b).

(c) *Net worth categories.* A federally-insured credit union defined as “new” under this section shall be classified—

(1) *Well capitalized* if it has a net worth ratio of seven percent (7%) or greater and also meets any applicable

risk-based net worth requirement under § 702.102;

(2) *Adequately capitalized* if it has a net worth ratio of six percent (6%) or more but less than seven percent (7%), and also meets any applicable risk-based net worth requirement under § 702.102;

(3) *Moderately capitalized* if it has a net worth ratio of three and one-half percent (3.5%) or more but less than six percent (6%), or fails to meet any applicable risk-based net worth requirement under § 702.102;

(4) *Marginally capitalized* if it has a net worth ratio of two percent (2%) or more but less than three and one-half percent (3.5%);

(5) *Minimally capitalized* if it has a net worth ratio of zero percent (0%) or greater but less than two percent (2%);

(6) *Uncapitalized* if it has a net worth ratio of less than zero percent (0%) (e.g., a deficit in retained earnings).

(d) *Reclassification based on supervisory criteria other than net worth.* Subject to § 702.101(c) and (d), the NCUA Board may reclassify a “well capitalized” new credit union as “adequately capitalized” and may require an “adequately capitalized,” “moderately capitalized” or marginally capitalized” new credit union to comply with certain statutory or discretionary supervisory actions as if it were in the next lower net worth category (each of such actions is hereinafter referred to generally as “reclassification”) in either of the circumstances prescribed in § 702.101(b).

§ 702.203 Prompt corrective action for “adequately capitalized” new credit unions.

Until an “adequately capitalized” new credit union becomes “well capitalized,” it must annually transfer earnings to its regular reserve account as provided in § 702.104.

§ 702.204 Prompt corrective action for “moderately capitalized” new credit unions.

(a) *Mandatory action by new credit union.* If a new credit union becomes “moderately capitalized” (including by reclassification under § 702.202(d)), it must immediately—

(1) *Earnings transfer.* Annually transfer earnings to its regular reserve account in an amount and at a rate reflected in the credit union’s initial or revised business plan;

(2) *Submit revised business plan.* Submit a revised business plan pursuant to § 702.208 if its net worth ratio has not increased consistent with its then-present business plan;

(3) *Restrict member business loans.* Not increase the total amount of member business loans until the credit

union becomes “adequately capitalized” unless it qualifies for an exception under 12 U.S.C. 1757a(b).

(b) *Discretionary actions by NCUA.* Subject to the applicable procedures set forth in subpart L of part 747 of this chapter for issuing, reviewing and enforcing directives, the NCUA Board may take one or more of the actions prescribed in § 702.105(b) and (c) if the credit union’s net worth has not increased consistent with its then-present business plan.

(c) *Discretionary conservatorship or liquidation.* Notwithstanding any other actions required or permitted to be taken under this section, when a new credit union becomes “moderately capitalized” (including by reclassification under § 702.202(d)), the NCUA Board may place the credit union into conservatorship pursuant to 12 U.S.C. 1786(h)(1)(F), or into liquidation pursuant to 12 U.S.C. 1787(a)(3)(A)(i), provided that the credit union has no reasonable prospect of becoming “adequately capitalized.”

§ 702.205 Prompt corrective action for “marginally capitalized” new credit unions.

(a) *Mandatory actions by new credit union.* If a new credit union becomes “marginally capitalized” (including by reclassification under § 702.202(d)), it must immediately—

(1) *Earnings transfer.* Annually transfer earnings to its regular reserve account in an amount and at a rate reflected in the credit union’s initial or revised business plan;

(2) *Submit revised business plan.* Submit a revised business plan pursuant to § 702.208 if its net worth ratio has not increased consistent with its then-present business plan; and

(3) *Restrict member business loans.* Not increase the total amount of member business loans except as provided in § 702.204(a)(3).

(b) *Discretionary actions by NCUA.* Subject to the applicable procedures set forth in subpart L of part 747 of this chapter for issuing, reviewing and enforcing directives, the NCUA Board may take one or more of the actions prescribed in § 702.106(b) if the credit union’s net worth has not increased consistent with its then-present business plan.

(c) *Discretionary conservatorship or liquidation.* Notwithstanding any other actions required or permitted to be taken under this section, when a new credit union becomes “marginally capitalized” (including by reclassification under § 702.202(d)), the NCUA Board may place the credit union into conservatorship pursuant to 12 U.S.C. 1786(h)(1)(F), or into liquidation

pursuant to 12 U.S.C. 1787(a)(3)(A)(i), provided that the credit union has no reasonable prospect of becoming "adequately capitalized."

§ 702.206 Prompt corrective action for "minimally capitalized" new credit unions.

(a) *Mandatory action by new credit union.* If a new credit union becomes "minimally capitalized," it must immediately—

(1) *Earnings transfer.* Annually transfer earnings to its regular reserve account in an amount and at a rate reflected in the credit union's initial or revised business plan;

(2) *Submit revised business plan.* Submit a revised business plan pursuant to § 702.208 if its net worth ratio has not increased consistent with its then-present business plan; and

(3) *Restrict member business loans.* Not increase the total amount of member business loans except as provided in § 702.204(a)(3).

(b) *Discretionary actions by NCUA.* Subject to the procedures set forth in subpart L of part 747 of this chapter for issuing, reviewing and enforcing directives, the NCUA Board may take one or more of the actions prescribed in § 702.107(b) if the credit union's net worth has not increased consistent with its then-present business plan.

(c) *Discretionary conservatorship or liquidation.* Notwithstanding any other actions required or permitted to be taken under this section, when a new credit union becomes "minimally capitalized" (including by reclassification under § 702.202(d)), the NCUA Board may place the credit union into conservatorship pursuant to 12 U.S.C. 1786(h)(1)(F), or into liquidation pursuant to 12 U.S.C. 1787(a)(3)(A)(i), provided that the credit union has no reasonable prospect of becoming "adequately capitalized."

§ 702.207 Prompt corrective action for "uncapitalized" new credit unions.

(a) *Mandatory action by new credit union.* If a federally-insured new credit union either remains "uncapitalized" beyond the time period provided in its initial business plan (approved at the time the credit union's charter was granted), or subsequently declines to that category, it must—

(1) *Earnings transfer.* Annually transfer earnings to its regular reserve account in an amount and at a rate determined reflected in the credit union's initial or revised business plan;

(2) *Submit revised business plan.* Within the period specified by the NCUA Board, but not to exceed 90 days from the date the credit union became "uncapitalized," submit a revised

business plan pursuant to § 702.208 providing for alternative means of funding the credit union's earnings deficit; and

(3) *Restrict member business loans.* Not increase the total amount of member business loans except as provided in § 702.204(a)(3).

(b) *Discretionary actions by NCUA.* Subject to the procedures set forth in subpart L of part 747 of this chapter for issuing, reviewing and enforcing directives, the NCUA Board may take one or more of the actions prescribed in § 702.107(b) if the credit union's net worth has not increased consistent with its then-present business plan.

(c) *Mandatory liquidation.* Notwithstanding any other actions required or permitted to be taken under this section, the NCUA Board—

(1) May place into liquidation pursuant to 12 U.S.C. 1787(a)(3)(A)(ii) an "uncapitalized" new credit union which fails to submit a revised business plan within the time provided under paragraph (a)(2) of this section; or

(2) Must place into liquidation pursuant to 12 U.S.C. 1787(a)(3)(A)(ii) an "uncapitalized" new credit union which still is "uncapitalized" ninety (90) calendar days after the date the NCUA Board approved the revised business plan submitted by the credit union pursuant to paragraph (a)(2) of this section, unless the credit union documents to the NCUA Board why it is viable and has a reasonable prospect of becoming "adequately capitalized."

§ 702.208 Revised business plans for new credit unions.

(a) *Schedule for filing.* (1) *Generally.* A "moderately capitalized," "marginally capitalized" or "minimally capitalized" new credit union must file a written revised business plan (RBP) with the appropriate Regional Director and, if State-chartered, with the appropriate State official within 30 calendar days of the date the credit union has notice (as provided under § 702.3(b)) that its net worth ratio has failed to increase consistent with its then-present business plan, unless the NCUA Board notifies the credit union in writing that its RBP is to be filed within a different period, or that the NCUA Board is waiving the requirement that the credit union file an RBP. An "uncapitalized" new credit union must file an RBP within the time provided under § 702.207(a)(2).

(2) *Failure to timely file plan.* When a new credit union fails to file an RBP as provided under paragraph (a)(1) of this section, the NCUA Board shall promptly notify the credit union that it has failed to file an RBP and that it has

15 calendar days from receipt of that notice within which to do so.

(b) *Contents of revised business plan.* A new credit union's RBP must, at a minimum—

(1) Address changes, since the new credit union's current business plan was approved, in any of the business plan elements required for charter approval under section IV.D. of NCUA's *Chartering and Field of Membership Manual* (IRPS 99-1), 63 FR 71998, 72019 (Dec. 30, 1998), or for State-chartered credit unions under applicable State law;

(2) Specify the steps the new credit union will take to become "adequately capitalized";

(3) Establish at least quarterly targets for increasing net worth during each year in which the RBP will be in effect;

(4) Specify the amount of earnings that it will annually transfer to its regular reserve as provided under § 702.204(a)(1);

(5) Explain how the new credit union will comply with the restrictions or requirements then in effect under this subpart;

(6) Specify the types and levels of activities in which the new credit union will engage;

(7) In the case of an RBP submitted due to reclassification under § 702.202(d), specify the steps the credit union will take to correct the unsafe or unsound condition or practice; and

(8) Include such other information as the NCUA Board may require.

(c) *Review of revised business plan.*

(1) *Consultation with State officials.* In the case of an RBP submitted by a federally-insured State-chartered new credit union, the NCUA Board shall, when evaluating the RBP, seek and consider the views of the appropriate State official.

(2) *Criteria for approval.* The NCUA Board shall not approve a new credit union's RBP unless it—

(i) addresses the items enumerated in paragraph (b) of this section;

(ii) is based on realistic assumptions, and is likely to succeed in restoring the credit union's net worth;

(iii) would not unreasonably increase the credit union's exposure to risk (including credit risk, interest-rate risk, and other types of risk); and

(iv) is supported by appropriate assurances from the credit union that it will comply with the approved plan until it has been "adequately capitalized" for four (4) consecutive calendar quarters.

(3) *Notice of decision.* Within 30 calendar days after receiving an RBP under this section, the NCUA Board shall notify the credit union in writing

whether its RBP is approved, and shall provide reasons for its decision in the event of disapproval. The NCUA Board may extend the time within which notice of its decision shall be provided.

(d) *Plan not approved.* (1) *Submission of new revised plan.* If an RBP is not approved by the NCUA Board, the new credit union shall submit a new RBP within 30 calendar days of receiving notice of disapproval of its initial RBP, unless it is notified in writing by the NCUA Board that the new RBP is to be filed within a different period.

(2) *Notice of decision on revised plan.* Within 30 calendar days after receiving an RBP under paragraph (d)(1) of this section, the NCUA Board shall notify the credit union in writing whether the new RBP is approved. The Board may extend the time within which notice of its decision shall be provided.

(e) *Amendment of plan.* A credit union that has filed an approved RBP may, after prior written notice to and approval by the NCUA Board, amend it to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the new credit union shall implement its existing RBP as approved prior to the proposed amendment.

§ 702.209 Incentives for new credit unions.

(a) *Management training for officers and employees.* At the discretion of the NCUA Board, NCUA (or non-profit organizations funded through grants or contracts under 12 U.S.C. 1766(f)(2)(A) and (i)(3)) will provide training in management, lending, product development and other areas for directors, officers and employees of new credit unions.

(b) *Assistance in preparing business plans.* At the discretion of the NCUA Board, NCUA (or non-profit organizations funded through grants or contracts under 12 U.S.C. 1766(f)(2)(A) and (i)(3)) will provide individualized guidance and training to directors, officers and employees of new credit unions in the preparation of business plans required for charter approval and RBPs required under § 702.208.

(c) *Small credit union program.* A new credit union is eligible to join and receive comprehensive benefits and assistance under NCUA's Small Credit Union Program.

Subpart C—Reserves

§ 702.301 Reserves.

(a) *Special reserve.* Each federally-chartered credit union shall establish and maintain such reserves as may be required by the FCUA, or by regulation, or in special cases by the NCUA Board.

(b) *Regular reserve.* Each federally-chartered credit union shall establish and maintain a regular reserve account. Earnings required to be transferred annually to a credit union's regular reserve under subparts A or B of this part shall be held in this account.

(c) *Transfers to regular reserve.* The transfer of earnings to a federally-chartered credit union's regular reserve when required under subparts A or B of this part must occur after charges for loan or other losses are addressed as provided in § 702.302(d), but before the declaration or payment of any dividends to members.

§ 702.302 Full and fair disclosure of financial condition.

(a) *Full and fair disclosure defined.* "Full and fair disclosure" is the level of disclosure which a prudent person would provide to a member of a federally-chartered credit union, to NCUA, or, at the discretion of the board of directors, to creditors to fairly inform them of the financial condition and the results of operations of the credit union.

(b) *Full and fair disclosure implemented.* The financial statements of a federally-insured credit union shall provide for full and fair disclosure of all assets, liabilities, and members' equity, including such valuation (allowance) accounts as may be necessary to present fairly the financial condition; and all income and expenses necessary to present fairly the statement of income for the reporting period.

(c) *Declaration of officials.* The Statement of Financial Condition, when presented to members, creditors or to the NCUA, shall contain a dual declaration by the treasurer and by the president, or in the absence of the president, by any other officer designated by the board of directors of the reporting credit union to make such declaration, that the report and related financial statements are true and correct to the best of their knowledge and belief and present fairly the financial condition and the statement of income for the period covered.

(d) *Charges for loan and other losses.* Full and fair disclosure demands that a credit union properly address charges for loan and other losses as follows:

(1) Charges for loan and other losses shall be made in accordance with generally accepted accounting principles (GAAP);

(2) The allowance for loan losses established for loans must fairly present the probable losses for all categories of loans and the proper valuation of loans. The valuation allowance must encompass specifically identified loans, as well as estimated losses inherent in

the loan portfolio, such as loans and pools of loans for which losses have been incurred but are not identifiable on a specific loan-by-loan basis;

(3) Adjustments to the valuation allowance for loan losses will be recorded in the expense account "Provision for Loan Losses";

(4) The maintenance of an allowance for loan losses shall not affect the requirement to transfer earnings to a credit union's regular reserve when required under subpart A or B of this part;

(5) At a minimum, adjustments to the allowance for loan losses shall be made prior to the distribution or posting of any dividend to the accounts of members.

§ 702.303 Payment of dividends.

(a) *Restriction on dividends.* Dividends shall be available only from post-closing, post-transfer, unappropriated, undivided earnings, if any.

(b) *Payment of dividends if undivided earnings depleted.* The board of directors of a federally-chartered credit union which has depleted the post-closing, post-transfer balance of its undivided earnings account may authorize a transfer of funds from the credit union's regular reserve to undivided earnings to pay dividends, provided that the credit union is classified "well capitalized" under subpart A or B of this part and either—

(1) The transfer of funds to undivided earnings will not cause the credit union's net worth classification to fall below "well capitalized"; or

(2) The appropriate Regional Director gives written approval for the transfer.

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

1. The authority citation for part 747 is revised to read as follows:

Authority: 12 U.S.C. 1766, 1786, 1784, 1787, 1790d and 4806(a); and 42 U.S.C. 4012a.

2. Part 747 is amended by adding a new subpart L to read as follows:

Subpart L—Issuance, Review and Enforcement of Orders Imposing Prompt Corrective Action

Sec.

747.2001 Scope.

747.2002 Review of order imposing prompt corrective action.

747.2003 Review of order reclassifying a credit union based on safety and soundness criteria.

747.2004 Review of order to dismiss a director or senior executive officer.

747.2005 Enforcement of orders.

Subpart L—Issuance, Review and Enforcement of Orders Imposing Prompt Corrective Action

§ 747.2001 Scope.

(a) *Independent review process.* The rules and procedures set forth in this subpart apply to federally-insured credit unions, whether federally- or state-chartered (other than corporate credit unions), who are subject to discretionary supervisory actions and to reclassification under part 702 of this chapter to facilitate prompt corrective action under section 216 of the Federal Credit Union Act, 12 U.S.C. § 1790d; and senior executive officers and directors of such credit unions who are dismissed pursuant to a discretionary supervisory action imposed under part 702. NCUA staff decisions to impose discretionary supervisory restrictions or requirements under part 702 shall be considered material supervisory determinations for purposes of 12 U.S.C. 1790d(k). Section 747.2002 of this subpart provides an independent appellate process to challenge such decisions.

(b) *Notice to State officials.* With respect to a federally-insured State-chartered credit union under sections 747.2002, 747.2003 and 747.2004 of this subpart, notices, directives and decisions on appeal served upon a credit union, or a dismissed director or officer thereof, by the NCUA Board shall also be served upon the appropriate State official. Responses, requests for a hearing and to present witnesses, and requests for reinstatement served upon the NCUA Board by a credit union, or dismissed director or officer thereof, shall also be served upon the appropriate State official.

§ 747.2002 Review of orders imposing prompt corrective action.

(a) *Notice of intent to issue directive.*—(1) *Generally.* Whenever the NCUA Board intends to issue a directive imposing a discretionary requirement or restriction on a credit union classified “undercapitalized” or lower under §§ 702.105 (b) and (c), 702.106(b) and 702.107(b) of this chapter, or on a new credit union classified “moderately capitalized” or lower under §§ 702.204(b), 702.205(b), 702.206(b) and 702.207(b) of this chapter, it must give the credit union prior notice of the proposed action. The credit union shall have such time to respond to a proposed directive as the NCUA Board provides under paragraph (c)(1) of this section.

(2) *Immediate issuance of directive without notice.* The NCUA Board may issue a directive to take effect immediately under paragraph (a)(1) of

this section without notice to the credit union if the NCUA Board finds it necessary in order to carry out the purposes of part 702 of this chapter. A credit union that is subject to a directive which takes effect immediately may appeal the directive in writing to the NCUA Board. Such an appeal must be received by the NCUA Board within 14 calendar days after the directive was issued, unless the NCUA Board permits a longer period. The NCUA Board shall consider any such appeal, if timely filed, within 60 calendar days of receiving it. Unless ordered by the NCUA Board, the directive shall remain in effect pending a decision on the appeal.

(b) *Contents of notice.* The NCUA Board’s notice to a credit union of its intention to issue a directive imposing a discretionary restriction or requirement must state:

(1) The credit union’s net worth ratio and net worth classification;

(2) The specific restrictions or requirements that the NCUA Board intends to impose, and the reasons therefor;

(3) The proposed date when the restriction or requirement would take effect and the proposed date for completing the required action or terminating the restriction; and

(4) The date by which the credit union must file its written response, if any, to the notice as required by paragraph (c)(1) of this section.

(c) *Response to notice.*—(1) *Time for response.* A credit union must file a written response, if any, to a notice of intent to issue a directive within 14 calendar days from the date of the notice, unless the NCUA Board determines that a shorter period is appropriate in light of the financial condition of the credit union or other relevant circumstances.

(2) *Content of response.* A credit union’s response to a notice of the NCUA Board’s intention to issue a directive imposing a discretionary restriction or requirement must:

(i) Explain why the proposed restriction or requirement is not an appropriate exercise of discretion under this part;

(ii) Request that the NCUA Board not issue or modify the proposed directive; and

(iii) Include other relevant information, mitigating circumstances, documentation, or other evidence in support of the credit union’s position regarding the proposed directive.

(d) *NCUA Board consideration of response.* After considering a credit

union’s response to a notice of the NCUA Board’s intention to issue a directive imposing a discretionary restriction or requirement, the NCUA Board may:

(1) Issue the directive as originally proposed or as modified;

(2) Determine not to issue the directive and so notify the credit union; or

(3) Seek additional information or clarification from the credit union or any other relevant source.

(e) *Failure to file response.* A credit union which fails to file a written response to a notice of the NCUA Board’s intention to issue a directive imposing a discretionary restriction or requirement, within the specified time period, shall be deemed to have waived the opportunity to respond and to have consented to the issuance of the directive.

(f) *Request to modify or rescind directive.* A credit union that is subject to a directive imposing a discretionary restriction or requirement may request in writing that the NCUA Board reconsider the terms of the directive, or rescind or modify it, due to changed circumstances. Unless otherwise ordered by the NCUA Board, the directive shall remain in effect while such request is pending.

§ 747.2003 Review of order reclassifying a credit union based on safety and soundness criteria.

(a) *Reclassification based on unsafe or unsound condition or practice.* (1) *Issuance of notice of proposed reclassification.* (i) *Grounds for reclassification.* The NCUA Board may reclassify a credit union or subject it to the supervisory actions applicable to the next lower net worth category (each such action hereinafter referred to as “reclassification”) pursuant to §§ 702.101(b) and 702.202(d) of this chapter;

(ii) *Prior notice to credit union.* Prior to reclassification, the NCUA Board shall issue and serve on the credit union a written notice of the NCUA Board’s intention to reclassify it to a lower net worth category.

(2) *Contents of notice.* A notice of intention to reclassify a credit union based on unsafe or unsound condition or practice shall state:

(i) The credit union’s net worth ratio, net worth category classification, and the net worth category to which the credit union would be reclassified;

(ii) The reasons for reclassification of the credit union;

(iii) The date by which the credit union must file with the NCUA Board a

written response to the proposed reclassification (and a request for a hearing), which date shall be no less than 14 calendar days from the date of service of the notice unless the NCUA Board determines that a shorter period is appropriate in light of the financial condition of the credit union or other relevant circumstances; and

(iv) That failure to—

- (A) File a written response to the notice of proposed reclassification, within the specified time period, shall be deemed a waiver of the opportunity to respond and to have consented to the reclassification;
- (B) That failure to request a hearing shall be deemed a waiver of any right to a hearing; and
- (C) That failure to request the opportunity to present witness testimony shall be deemed a waiver of any right to present such testimony.

(3) *Response to notice of proposed reclassification.* A credit union may file a written response to a notice of proposed reclassification within the time period set by the NCUA Board. The response should explain why the credit union is not in an unsafe or unsound condition or has not corrected an unsafe or unsound practice, or otherwise should not be reclassified, and include any relevant information, mitigating circumstances, documentation, or other evidence in support of the credit union's position. A credit union which fails to file a written response to a notice of proposed reclassification, within the specified time period, shall be deemed to have waived the opportunity to respond and to have consented to the reclassification.

(4) *Request for informal hearing and presentation of witness testimony.* A credit union's response to a notice of proposed reclassification may include a request for an informal hearing before the NCUA Board under this section. If the credit union wishes to present witness testimony at the hearing, the credit union shall include a request to do so which specifies the names of the witnesses and the general nature of their expected testimony. Failure to request an informal hearing shall be deemed a waiver of any right to a hearing, and failure to request the opportunity to present witness testimony shall be deemed a waiver of any right to present such testimony.

(5) *Order for informal hearing.* Upon timely receipt of a written response that includes a request for a hearing, the NCUA Board shall issue an order commencing an informal hearing no

later than 30 days after receipt of the request, unless the credit union requests a later date. The hearing shall be held in Alexandria, Virginia, or at such other place as may be designated by the NCUA Board, before a presiding officer designated by the NCUA Board to conduct the hearing and to recommend a decision.

(6) *Procedures for informal hearing.*

(i) The credit union shall have the right to introduce relevant documents and to present oral argument at the hearing. The credit union may introduce witness testimony only if expressly authorized by the NCUA Board or the presiding officer. Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure (12 CFR 747.1) shall apply to an informal hearing under this section unless the NCUA Board orders otherwise.

(ii) The informal hearing shall be recorded, and a transcript shall be furnished to the credit union upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or by the presiding officer. The presiding officer may ask questions of any witness.

(iii) The presiding officer may order that the hearing be continued for a reasonable period following completion of witness testimony or oral argument to allow additional written submissions to the hearing record.

(7) *Recommendation of presiding officer.* Within 20 calendar days following the closing of the hearing and the record, the presiding officer shall make a recommendation to the NCUA Board on the proposed reclassification.

(8) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of receipt of the credit union's response in a case where no hearing was requested, the NCUA Board will decide whether to reclassify the credit union, and will notify the credit union of its decision. The decision of the NCUA Board shall be final.

(b) *Request to rescind reclassification.* Any credit union that has been reclassified under this section may file a written request to the NCUA Board to reconsider or rescind the reclassification, or to modify, rescind or remove any directives issued as a result of the reclassification. Unless otherwise ordered by the NCUA Board, the credit union shall remain reclassified, and

subject to any directives issued as a result, while such request is pending.

(c) *Non-delegation.* The NCUA Board may not delegate its authority to reclassify a credit union into a lower net worth category or to treat a credit union as if it were in a lower net worth category pursuant to §§ 702.101(b) or 702.202(d) of this chapter.

§ 747.2004 Review of order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the NCUA Board issues and serves a directive on a credit union pursuant to § 747.2002 requiring it to dismiss from office any director or senior executive officer under § 702.105(c)(2), 702.106(b)(8), 702.107(b)(8), 702.204(b), 702.205(b), 702.206(b) or 702.207(b) of this chapter, the NCUA Board shall also serve a copy of the directive (or the relevant portions, where appropriate) upon the person to be dismissed, and shall advise that person in writing that failure to—

(1) Request reinstatement shall be deemed a waiver of any right to seek reinstatement;

(2) Request a hearing shall be deemed a waiver of any right to a hearing; and

(3) Request the opportunity to present witness testimony shall be deemed a waiver of the right to present such testimony.

(b) *Response to directive.* (1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed with the NCUA Board within 10 business days after the Respondent received the directive, unless further time is allowed by the NCUA Board at the request of the Respondent.

(2) *Contents of request for informal hearing.* The request for reinstatement shall include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the NCUA Board under this section. If the Respondent wishes to present witness testimony at the hearing, the Respondent shall include a request to do so which specifies the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall be deemed a waiver of any right to a hearing and failure to request the opportunity to present witness testimony shall be deemed a waiver of any right to present such testimony.

(3) *Effective date.* Unless otherwise ordered by the NCUA Board, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a credit union to dismiss from office any director or senior executive officer, the NCUA Board shall issue an order commencing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Alexandria, Virginia, or at such other place as may be designated by the NCUA Board, before a presiding officer designated by the NCUA Board to conduct the hearing and recommend a decision.

(d) *Procedures for informal hearing—*

(1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant documents and to present oral argument. A Respondent may introduce witness testimony only if expressly authorized by the NCUA Board or by the presiding officer. Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure (12 CFR 741.1) apply to an informal hearing under this section unless the NCUA Board orders otherwise.

(2) The informal hearing shall be recorded, and a transcript shall be furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer. The presiding officer may ask questions of any witness.

(3) The presiding officer may order that the hearing be continued for a reasonable period (normally five business days) following completion of witness testimony or oral argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the credit union would materially strengthen the credit union's ability to—

(1) Become “adequately capitalized,” to the extent that the directive was issued as a result of the credit union's net worth ratio or failure to submit or implement a net worth restoration plan or revised business plan; and

(2) Correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of reclassification of the credit union pursuant to §§ 702.101(d) and 702.202(d) of this chapter.

(f) *Recommendation of presiding officer.* Within 20 calendar days following the date the hearing and the record are closed, the presiding officer shall make a recommendation to the NCUA Board concerning the Respondent's request for reinstatement with the credit union.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the NCUA Board shall grant or deny the request for reinstatement and shall notify the Respondent of its decision. If the NCUA Board denies the request for reinstatement, it shall set forth in the notification the reasons for

the its action. The decision of the NCUA Board shall be final.

§ 747.2005 Enforcement of orders.

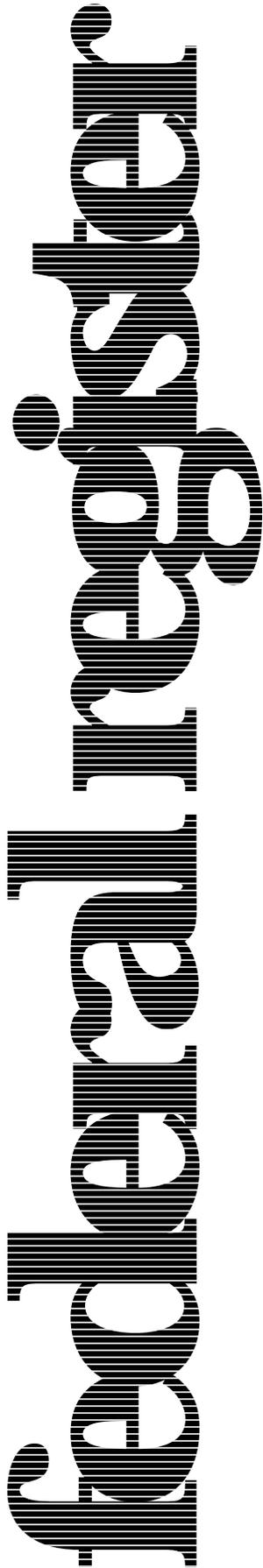
(a) *Judicial remedies.* Whenever a credit union fails to comply with a directive imposing a discretionary supervisory action or enforcing a mandatory supervisory action under part 702 of this chapter, the NCUA Board may seek enforcement of the directive in the appropriate United States District Court pursuant to 12 U.S.C. 1786(k)(1).

(b) *Administrative remedies—(1) Failure to comply with directive.* Pursuant to 12 U.S.C. 1786(k)(2)(A), the NCUA Board may assess a civil money penalty against any credit union that violates or otherwise fails to comply with any final directive issued under part 702 of this chapter against any institution-affiliated party of a credit union who participates in such violation or noncompliance;

(2) *Failure to implement plan.* Pursuant to 12 U.S.C. 1786(k)(2)(A), the NCUA Board may assess a civil money penalty against a credit union which fails to implement a net worth restoration plan under subpart A of part 702 or a revised business plan under subpart B of part 702.

(c) *Other enforcement action.* In addition to the actions described in paragraphs (a) and (b) of this section, the NCUA Board may seek enforcement of the directives issued under part 702 of this chapter through any other judicial or administrative proceeding authorized by law.

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Tuesday
May 18, 1999

Part IV

**Department of
Housing and Urban
Development**

**FY 1999 Super Notice of Funding
Availability (SuperNOFA); Notice of
Extension of Application Deadline for
Applicants in Oklahoma and Kansas
Disaster Areas for Continuum of Care
Homeless Assistance, Housing
Counseling and Section 202 and Section
811 Programs; and Clarification to
Sections 202 and 811 Programs**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

[Docket No. FR-4410-C-03]

**FY 1999 Super Notice of Funding
Availability (SuperNOFA); Notice of
Extension of Application Deadline for
Applicants in Oklahoma and Kansas
Disaster Areas for Continuum of Care
Homeless Assistance, Housing
Counseling and Section 202 and
Section 811 Programs; and
Clarification to Sections 202 and 811
Programs**

AGENCY: Office of the Secretary, HUD.
ACTION: Notice.

SUMMARY: On February 26, 1999, HUD published its Fiscal Year (FY) 1999 Super Notice of Funding Availability (SuperNOFA) for HUD's Housing, Community Development, and Empowerment programs. This notice extends the application due date for applicants in certain counties of Oklahoma, Kansas and Texas (designated as disaster areas as a result of the tornados in early May 1999) who are seeking funding under the following SuperNOFA Programs: Continuum of Care Homeless Assistance, Housing Counseling, Section 202 Program of Supportive Housing for the Elderly and Section 811 Program of Supportive Housing for Persons with Disabilities. This notice also (1) republishes the Introduction and General Section of the FY 1999 SuperNOFA to reflect recent changes, such as the change in application due dates for the programs listed above, and the publication of a new Public Housing Drug Elimination NOFA, and (2) clarifies certain provisions of the Section 202 and Section 811 Programs.

DATES: The application due date for Continuum of Care Homeless Assistance Program applicants located in the disaster counties as identified in this notice is July 8, 1999. For all other Continuum of Care Homeless Assistance Program applicants, the due date remains June 2, 1999.

The application due date for the Housing Counseling Program for applicants located in the disaster counties identified in this notice is June 24, 1999. For all other Housing Counseling applicants, the application due date remains May 25, 1999.

The application due date for Section 202 Program applicants and Section 811 Program applicants located in the disaster counties identified in this notice is June 29, 1999. For all other Section 202 Program applicants and Section 811 Program applicants, the

application due date remains May 27, 1999.

FOR FURTHER INFORMATION CONTACT: For the programs listed in this notice, please contact the office or individual listed in the **FOR FURTHER INFORMATION** portion of the section of the individual programs that are part of the SuperNOFA, published on February 26, 1999 at 64 FR 9618.

SUPPLEMENTARY INFORMATION:

I. Background

On February 26, 1999 (64 FR 9618), HUD published its FY 1999 SuperNOFA for HUD's Housing, Community Development, and Empowerment programs. The FY 1999 SuperNOFA announced the availability of approximately \$2.4 billion in HUD program funds covering 32 grant programs and program components administered by the following HUD offices: the Office of Community Planning and Development (CPD); the Office of Housing-Federal Housing Administration (FHA); the Office of Public and Indian Housing (PIH); the Office of Policy Development and Research (PD&R); the Office of Fair Housing and Equal Opportunity (FH&EO); and the Office of Lead Hazard Control. On April 27, 1999 (64 22634), HUD published a notice that extended the application deadlines of two programs (HOPE VI and FHIP) and made certain corrections and clarifications to four programs (FHIP, Lead-Based Hazard Control Program, Section 202 Supportive Housing for the Elderly Program; and Section 811 Supportive Housing for Persons with Disabilities Program).

The purpose of this notice is to:

(1) Extend the application due date for applicants in certain counties in the States of Oklahoma, Kansas and Texas, that have been designated disaster areas (as a result of the tornados in early May 1999) who are seeking funding under the following SuperNOFA programs: Continuum of Care Homeless Assistance, Housing Counseling, Section 202, and Section 811;

(2) Republish the Introduction and General Section of the FY 1999 SuperNOFA which has been updated and reflects changes, such as the extended application due date for certain applicants in specified SuperNOFA programs;

(3) Clarify certain provisions in the Section 202 and Section 811 Programs.

II.A. Extension of Application Due Date for Certain SuperNOFA Programs for Applicants Affected by Recent Tornado Disasters

Certain programs in the FY 1999 SuperNOFA provide for extended application deadlines for applicants in

counties that have been designated disaster areas as a result of the tornados in early May 1999, and under the following disaster declarations: FEMA-1272-DR, FEMA-1273-DR, FEMA-1274-DR. This notice provides the list of counties designated disaster areas as of May 13, 1999. Additional counties may be designated as disaster areas as a result of the tornados that occurred in early May 1999. Any additional counties, if designated, will be posted on HUD's web page (www.hud.gov) and published by Federal Emergency Management Agency (FEMA) in the **Federal Register**. As of May 13, 1999, the following counties have been designated disaster areas:

- In the State of Oklahoma—Caddo, Canadian, Cleveland, Craig, Creek, Grady, Kingfisher, LeFlore, Lincoln, Logan, McClain, Noble, Oklahoma, Ottawa, Pottawatomie and Tulsa counties;
- In the State of Kansas—the counties of Reno, Sedgewick, and Sumner; and
- In the State of Texas—the county of Bowie. For these counties, application due dates for the following SuperNOFA programs are extended to the dates listed below:

1. *Continuum of Care Homeless Assistance Programs*. July 8, 1999.
2. *Housing Counseling Program*. June 24, 1999.
3. *Section 202 and Section 811 Programs*. June 29, 1999.

For all other applicants, the application due dates for these programs remain unchanged. For all other SuperNOFA programs (other than the three programs listed above), the application due dates remain unchanged. For the convenience of the reader, you may refer to the funding chart included in this notice.

B. Publication of a new Public Housing Drug Elimination Program NOFA

On May 12, 1999, HUD published in the **Federal Register** a notice withdrawing the Public Housing Drug Elimination Program (PHDEP) NOFA published as part of the FY 1999 SuperNOFA, and published a new PHDEP NOFA. The withdrawal and reissuance of a PHDEP NOFA is part of HUD's transition to providing PHDEP funding through formula allocation. On May 12, 1999, HUD also published a proposed rule to implement the distribution of PHDEP funding under a non-competitive formula. The information requested by the May 12, 1999 PHDEP funding will be used by HUD whether or not funds are distributed competitively, and will reduce the current reporting burden on applicants. This action is intended to

prevent an interruption in the funding process while issues related to the proposed rule are resolved.

The application deadline for the May 12, 1999 PHDEP NOFA is June 16, 1999.

III. Clarification to Section 811 Program

On April 27, 1999 (64 FR 22634), HUD published a **Federal Register** notice making certain clarifications and corrections to several of the program sections in the FY 1999 SuperNOFA, including the program section for the Section 811 Program of Supportive Housing for Persons with Disabilities. Among other corrections to the Section 811 Program, the April 27, 1999 notice provided that to obtain 5 rating points under Rating Factor 3 ("Soundness of Approach"), at least 51% of a Sponsor's board must consist of persons with disabilities (including persons who have disabilities similar to those of the prospective residents).

The language in the April 27, 1999 notice regarding this correction to the Section 811 program section of the SuperNOFA was accurate (see 64 FR 22634, 22638). However, the preamble discussion of this correction was unclear, and might have been incorrectly interpreted to mean that all Sponsors under the Section 811 Program are required to have boards with 51% membership consisting of persons with disabilities (including persons who have disabilities similar to those of the prospective residents). This notice clarifies that the 51% requirement only applies for purposes of obtaining 5 points under Rating Factor 3.

IV. Clarification to Section 202 and Section 811 Programs

Section 202 Program. The April 27, 1999 notice amending the FY 1999 SuperNOFA for the Section 202 Program specified that:

(1) If the contract of sale requires closing of the purchase on a date earlier than the 202 closing, the applicant must escrow the amount of the purchase price (see 64 FR 22638, middle column); and

(2) If renewal of the option agreement requires a payment or deposit for renewal, the applicant must escrow the amount of the payment or deposit (see 64 FR 22638, middle column);

Today's notice clarifies further that for both (1) and (2), the Section 202 applicant must submit documentation in Exhibit 4(d) of its application that the amount has been escrowed.

Section 811 Program. The April 27, 1999 notice amending the FY 1999 SuperNOFA for the Section 811 Program specified that:

(1) If the contract of sale requires closing of the purchase on a date earlier than the 811 closing, the applicant must escrow the amount of the purchase price (see 64 FR 22638, third column); and

(2) If renewal of the option agreement requires a payment or deposit for renewal, the applicant must escrow the amount of the payment or deposit (see 64 FR 22638, third column);

Today's notice clarifies further that for both (1) and (2), the Section 811 applicant must submit documentation in Exhibit 4(d) of its application that the amount has been escrowed.

Additionally, the submission is necessary to be eligible for the 5 points for site control.

V. Introduction and General Section to the FY 1999 SuperNOFA

The Introduction and General Section to the FY 1999 SuperNOFA is updated and republished for the convenience of applicants for SuperNOFA programs for which the application periods have not yet closed.

HUD's Fiscal Year 1999 SuperNOFA Process

Background: the Introduction of the SuperNOFA—the FY 98 SuperNOFA

In Fiscal Year 1998, HUD introduced its first SuperNOFA. HUD's FY 1998 SuperNOFA represented a marked departure from, and HUD believes a significant improvement over, HUD's past approach to the funding process. Before the FY 1998 SuperNOFA, HUD had issued as many as 40 separate NOFAs. These 40 NOFAs had widely varying rules and application processing requirements, and were published at various times throughout the fiscal year. This individual program approach to funding, with different publication schedules, did not encourage and, at times, unintentionally interfered with local efforts directed at comprehensive planning as well as development of comprehensive local solutions. Additionally, the old approach seemed to require communities to respond to HUD's needs instead of HUD responding to local needs.

In his first year as Secretary of HUD, Secretary Andrew Cuomo immediately sought to change this outdated approach to funding. Secretary Cuomo brought to the leadership of HUD the experience of successfully implementing a consolidated planning process in HUD's community development programs. As Assistant Secretary for Community Planning and Development, Secretary Cuomo consolidated the planning, application, and reporting requirements of several community development programs. The Consolidated Plan rule,

published in 1995, established a renewed partnership among HUD, State, and local governments, public and private agencies, tribal governments, and the general citizenry by empowering field staff to work with other entities in fashioning creative solutions to community problems.

HUD's FY 1998 SuperNOFA promoted HUD's objective, under the direction of Secretary Cuomo, of improving customer service and providing the necessary tools for revitalizing communities and improving the lives of people within those communities. The SuperNOFA increased the ability of applicants to consider and apply for funding under a wide variety of HUD programs in response to a single NOFA. In addition to applicants, HUD believes that everyone interested in HUD's grant programs can benefit from having this information made available in one document, and that having the information on available funding one time will facilitate local planning and coordination.

Changes Made in the SuperNOFA Process for FY 1999

One SuperNOFA. For Fiscal Year 1999, HUD is taking the next step of improving its funding process by issuing one single SuperNOFA. In FY 1998, HUD issued three SuperNOFAs:

(1) The SuperNOFA for HUD's Housing and Community Development Programs;

(2) The SuperNOFA for HUD's Economic Development and Empowerment Programs; and

(3) The SuperNOFA for HUD's Targeted Housing and Homeless Assistance Programs.

HUD's FY 1999 SuperNOFA consolidates the programs in these three SuperNOFAs into one SuperNOFA—the SuperNOFA for HUD's Housing, Community Development and Empowerment Programs. The housing component of this SuperNOFA encompasses many of HUD's housing programs, including targeted housing and homeless assistance. The community development component of this SuperNOFA encompasses HUD's economic development programs, and the empowerment component encompasses HUD's youthbuild and self-help programs.

Plain Language. In addition to increased consolidation, HUD strived to make the FY 1999 SuperNOFA simpler and easier to understand. On June 1, 1998, President Clinton issued a memorandum to all Federal agencies that directs agencies to use plain language in all of their documents. HUD

prepared its FY 1999 SuperNOFA to comply with the plain language principles. These principles include using common, everyday words (except for necessary technical terms), the active voice and short sentences.

Earlier Publication and More Time to Prepare Applications. Finally, HUD is publishing its SuperNOFA earlier than in FY 1998. By publishing earlier in the Federal Fiscal Year, HUD can provide you, the applicant, more time to prepare and submit your SuperNOFA application(s).

Program Changes to Note: (1) HOPWA-TA. This year technical assistance under the Housing Opportunities for Persons with AIDS (HOPWA) has been consolidated into the Community Development Technical Assistance (CD-TA) Program section of the SuperNOFA. If you are interested in applying for this program, please see the CD-TA Program section.

(2) *Youth Sports Program.* This year, youth sports activities are eligible under the PIH Drug Elimination Grant Program.

(3) *Possible Formula Funding for Public Housing Drug Elimination Program.* On February 18, 1999, HUD published in the **Federal Register** an Advance Notice of Proposed Rulemaking (ANPR) announcing HUD's intention to develop, through proposed rulemaking, a formula allocation funding for HUD's Public Housing Drug Elimination Program (PHDEP). The February 18, 1999 ANPR solicits comments in advance of this rulemaking on a method, components of a method, or methods that would result in reliable and equitable funding to public housing agencies with drug elimination programs and ensure that this funding is allocated to agencies meeting certain performance standards. On May 12, 1999, HUD published a proposed rule on formula allocation for PHDEP funding. The May 12, 1999 proposed rule describes HUD's proposal for non-competitive allocation of PHDEP funds, and solicits public comment. On May 12, 1999, HUD also withdrew the PHDEP NOFA that was part of HUD's FY 1999 SuperNOFA, published on February 26, 1999, and republished a new NOFA for which the information provided under this May 12, 1999 NOFA will reduce the current reporting burden on applicants, and will be used by HUD whether or not funds are distributed competitively.

Similarities Between FY 1998 and FY 1999 SuperNOFAs

The FY 1999 SuperNOFA, like the FY 1998 SuperNOFA, places heavy emphasis on the coordination of activities to provide:

- (1) Greater flexibility and responsiveness in meeting local housing and community development needs, and
- (2) Greater flexibility to applicants to determine what HUD program resources best fit the community's needs, as identified in local Consolidated Plans and Analysis of Impediments to Fair Housing Choice ("Analysis of Impediments" (AI)).

The FY 1999 SuperNOFA is designed to:

- Simplify the application process;
- Promote effective and coordinated use of program funds in communities;
- Reduce duplication in the delivery of services and economic development and empowerment programs;
- Allow applicants to seek to deliver a wider, more integrated array of services; and
- Improve the system for potential grantees to be aware of, and compete for program funds.

Once again, HUD strongly encourages applicants to work together to coordinate and, to the maximum extent possible, join their activities to form a seamless and comprehensive program of assistance to meet identified needs in their communities. This coordination also should help applicants jointly address barriers to fair housing and equal opportunity that have been identified in the community's Consolidated Plan and Analysis of Impediments in the geographic area(s) in which they are seeking assistance.

As part of the simplification of this funding process, and to avoid duplication of effort, the SuperNOFA provides for consolidated applications for several of the programs that are part of this SuperNOFA. HUD programs that provide assistance for, or complement, similar activities (for example, the Continuum of Care programs and CPD Technical Assistance programs) have a consolidated application that reduces the administrative and paperwork burden applicants would otherwise encounter in submitting a separate application for each program. The Program Chart in this introductory section of the SuperNOFA identifies the programs that have been consolidated

and for which a consolidated application is made available to eligible applicants. Eligible applicants are able, as they have been in the past, to apply for funding under as few as one or as many as all programs for which they are eligible.

The specific statutory and regulatory requirements of the programs that are part of this SuperNOFA continue to apply to each program. The SuperNOFA will identify, where necessary, the statutory requirements and differences applicable to the specific programs. Please pay careful attention to the individual program requirements that are identified for each program. Also, you will note that not all applicants are eligible to receive assistance under all programs identified in this SuperNOFA.

The SuperNOFA is divided into two major sections. The General Section of the SuperNOFA describes the procedures and requirements that are applicable to all applications. The Programs Section of the SuperNOFA describes each program that is part of this SuperNOFA. For each program, the Programs Section describes the eligible applicants, eligible activities, factors for award, and any additional requirements or limitations that apply to the program.

Please read carefully both the General Section and the Programs Section of the SuperNOFA for the program(s) to which you are applying. Your careful reading will ensure that you apply for program funding for which your organization is eligible to receive funds and you fulfill all the requirements for that program(s).

The Programs of This SuperNOFA and The Amount of Funds Allocated

The programs that are part of this SuperNOFA are identified in the chart below. The approximate available funds for each program are expected funding levels based on appropriated funds. In the event HUD recaptures funds or other funds become available for any program, HUD reserves the right to increase the available program funding amounts by the amount available.

The chart also includes the application due date for each program, the OMB approval number for the information collection requirements contained in the specific program, and the Catalog of Federal Domestic Assistance (CFDA) number.

HUD FY 1999 SUPERNOFA FUNDING

NOTE: The chart below reflects the updates made by HUD in its April 27, 1999 notice (64 FR 22634), as well as the extension of the application due date for Continuum of Care applicants in the Oklahoma and Kansas disaster counties.

Program Name	Funding Available	Due Date	Submission Location and Room
<i>HOUSING AND COMMUNITY DEVELOPMENT</i>			
Community Development Technical Assistance	\$ 24.25 million		
Community Development Block Grant (CDBG) TA CFDA No: 14.227 OMB Approval No.:2506-0166	\$ 2.5 million	May 26, 1999	HUD Headquarters Room 7251, and copies to appropriate local HUD Field Offices
Community Housing Development Organization (CHDO) TA CFDA No. 14.239 OMB Approval No.:2506-0166	\$ 9 million	May 26, 1999	HUD Headquarters Room 7251, and copies to appropriate local HUD Field Offices
HOME TA CFDA No. 14.239 OMB Approval No.:2506-0166	\$ 8 million	May 26, 1999	HUD Headquarters Room 7251, and copies to appropriate local HUD Field Offices
Supportive Housing Program (SHP) TA CFDA No. 14.235 OMB Approval No.:2506-0166	\$ 2.5 million	May 26, 1999	HUD Headquarters Room 7251, and copies to appropriate local HUD Field Offices
HOPWA TA CFDA No. 14.241 OMB Approval No.:2506-0133	\$ 2.25 million	May 26, 1999	HUD Headquarters Room 7251

Program Name	Funding Available	Due Date	Submission Location and Room
UNIVERSITY AND COLLEGE PARTNERSHIPS			
University and College Programs	\$ 22.15 million		
Community Outreach Partnership Centers (COPC) CFDA No: 14511 OMB Approval No.:2528-0180	\$ 7.5 million	June 9, 1999	HUD Headquarters Room 7251
Historically Black Colleges and Universities (HBCUs) Program CFDA No.: 14.237 OMB Approval No.: 2506-0122	\$ 9 million	June 9, 1999	HUD Headquarters Room 7251 and copies to local HUD Field Office
Hispanic-Serving Institutions Assisting Communities (HSIAC) Program CFDA No.: 14.514 OMB Approval No.:2528-0198	\$ 5.65 million	June 9, 1999	HUD Headquarters Room 7251
FAIR HOUSING OUTREACH, ENFORCEMENT AND ASSISTED HOUSING COUNSELING			
Fair Housing and Housing Counseling Programs	\$ 31.6 million		
Education and Outreach Initiative (EOI) CFDA No.: 14.409 OMB Approval No.: 2529-0033	\$ 4.5 million	June 30, 1999	HUD Headquarters Room 5234
Private Enforcement Initiative (PEI) CFDA No.: 14.410 OMB Approval No.: 2539-0033	\$ 9.3 million	June 30, 1999	HUD Headquarters Room 5234
Fair Housing Organizations Initiative (FHOI) CFDA No.: 14.413 OMB Approval No.: 2539-0033	\$ 1.2 million	June 30, 1999	HUD Headquarters Room 5234

Program Name	Funding Available	Due Date	Submission Location and Room
Local Housing Counseling Agencies CFDA No.: 14.169 OMB Approval No.: 2502-0261	\$ 5.6 million	May 25, 1999 June 24, 1999 (Only for applicants located in Oklahoma, Kansas, & Texas, disaster counties - see final page of chart for counties)	Appropriate HUD Homeownership Center (HOC)
National, Regional, and Multi-State Intermediaries CFDA No.: 14.169 OMB Approval No.: 2502-0261	\$ 7.5 million	May 25, 1999 June 24, 1999 (Only for applicants located in Oklahoma, Kansas, & Texas disaster counties - see final page of chart for counties)	HUD Headquarters Room 9166
State Housing Finance Agencies CFDA No.: 14.169 OMB Approval No.: 2502-0261	\$ 3.5 million	May 25, 1999 June 24, 1999 (Only for applicants located in Oklahoma, Kansas, & Texas disaster counties - see final page of chart for counties)	Appropriate HUD Homeownership Center (HOC)
LEAD HAZARD CONTROL			
Lead-Based Paint Hazard Control Programs	\$ 62.5 million		
Lead-Based Paint Hazard Control Program CFDA No.: 14.900 OMB Approval No.: pending	\$ 56 million	May 26, 1999	Postal Service: HUD Headquarters, Office of Lead Hazard Control, Room P3206

Program Name	Funding Available	Due Date	Submission Location and Room
Research to Improve Evaluation and Control of Residential Lead-Based Paint Hazards CFDA No.: 14.900 OMB Approval No.: 2529-0011	\$ 2.5 million	May 26, 1999	Postal Service: HUD Headquarters, Office of Lead Hazard Control, Room P3206
Mold and Moisture Control in Inner City Housing CFDA No.: 14.900 OMB Approval No.: pending	\$ 4 million	May 26, 1999	Postal Service: HUD Headquarters, Office of Lead Hazard Control, Room P3206
<i>PUBLIC AND INDIAN HOUSING REVITALIZATION AND DEMOLITION</i>			
Revitalization and Demolition Programs	\$ 583 million		
Hope VI Revitalization Grants CFDA No.: 14.866 OMB Approval No.: 2577-0208	\$ 523 million	May 27, 1999	HUD Headquarters Room 4138 and copies to appropriate local HUD Field Office
HOPE VI Demolition Grants CFDA No.: 14.866 OMB Approval No.: 2577-0208	\$ 60 million	July 29, 1999	HUD Headquarters Room 4138 and copies to appropriate local HUD Field Office

Program Name	Funding Available	Due Date	Submission Location and Room
<i>DRUG ELIMINATION IN PUBLIC AND ASSISTED HOUSING</i>			
Drug Elimination Programs	\$ 289.30 million		
Public Housing Drug Elimination Program (including Youth Sports Eligible Activities) * A new PHDEP NOFA was published on May 12, 1999. The application due date is unchanged. CFDA No.: 14.854 OMB Control No.: 2577-0124	\$ 242.75 million	June 16, 1999	Appropriate local HUD Field Office or Area Office of Native American Programs
Public Housing Drug Elimination New Approach (Formerly Safe Neighborhood Grant) CFDA No.: 14.854 OMB Control No.: 2577-0124	\$ 28.3 million	July 1, 1999	Appropriate local HUD Field Office or Area Office of Native American Programs
Public Housing Drug Elimination TA CFDA No.: 14.854 OMB Control No.: 2577-0124	\$ 2 million	June 16, 1999	HUD Headquarters Room 4206
Drug Elimination Grants for Multifamily Low Income Housing CFDA No.: 14.193 OMB Approval No.: 2502-0476	\$ 16.25 million	June 16, 1999	Appropriate local HUD Field Office or Area Office of Native American Programs

Program Name	Funding Available	Due Date	Submission Location and Room
<i>ECONOMIC DEVELOPMENT AND EMPOWERMENT</i>			
Economic and Empowerment Programs	\$ 120 million		
Economic Development Initiative CFDA No.: 14.246 OMB Approval No.: 2506-0153	\$ 35 million	June 11, 1999	HUD Headquarters Room 7251 and copy to appropriate local HUD Field Office
Brownfields Economic Development Initiative CFDA No.: 14.246 OMB Approval No.: 2506-0153	\$ 25 million	June 25, 1999	HUD Headquarters Room 7251 and copy to appropriate local HUD Field Office
Self-Help Homeownership Opportunity Program (SHOP) CFDA No.: 14.247 OMB Approval No.: N/A	\$ 20 million	April 29, 1999	HUD Headquarters Room 7251
Youthbuild CFDA No.: 14.243 OMB Approval No.: 2508-0142	\$ 40 million	April 30, 1999	HUD Headquarters Room 7251 and copy to appropriate local HUD Field Office

Program Name	Funding Available	Due Date	Submission Location and Room
TARGETED HOUSING AND HOMELESS ASSISTANCE			
Targeted Housing and Homeless Assistance Programs	\$ 1,224.27 million		
Continuum of Care Homeless Assistance - Supportive Housing CFDA No.: 14.235 - Shelter Plus Care CFDA No.: 14.238 - Section 8 Moderate Rehabilitation Single Room Occupancy (SRO) CFDA No.: 14.249 OMB Approval No.: 2506-0112	\$ 750 million	June 2, 1999 July 8, 1999 (Only for applicants located in Oklahoma, Kansas, & Texas disaster counties*)	HUD Headquarters Room 7270 and copies to appropriate local HUD Field Offices
Housing Opportunities for Persons with AIDS CFDA No.: 14.241 OMB Approval No.: 2506-0133	\$ 22.27 million	June 2, 1999	HUD Headquarters Room 7251 and copies to appropriate local HUD Field Office
Section 202 Supportive Housing for the Elderly CFDA No.: 14.157 OMB Approval No.: 2502-0267	\$ 434.8 million	May 27, 1999 June 29, 1999 (Only for applicants located in Oklahoma, Kansas, & Texas disaster counties*)	Appropriate local HUD Multifamily HUB or Multifamily Program Center
Section 811 Supportive Housing for Persons with Disabilities CFDA No.: 14.181 OMB Approval No.: 2502-0462	\$ 87.2 million	May 27, 1999 June 29, 1999 (Only for applicants located in Oklahoma, Kansas, & Texas disaster counties*)	Appropriate local HUD Multifamily HUB or Multifamily Program Center

* These counties are as follows: in the State of Oklahoma -- Caddo, Canadian, Cleveland, Craig, Creek, Grady, Kingfisher, LeFlore, Lincoln, Logan, McClain, Noble, Oklahoma, Pottawatomie, and Tulsa counties; in the State of Kansas -- Reno, Sedgewick, and Sumner counties; and in the State of Texas -- Bowie county (and such other counties that may be designated as disaster areas as a result of the tornados that occurred in early May 1999).

Paperwork Reduction Act Statement

The information collection requirements in this SuperNOFA have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The chart shown above provides the OMB approval number for each program that is part of this SuperNOFA. Where the chart notes that an OMB number is pending, this means that HUD has submitted the information to OMB to obtain an approval number and HUD's request for the number is pending. As soon as HUD receives the approval number, the number will be published in the **Federal Register** and provided to the SuperNOFA Information Center. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

General Section of the SuperNOFA

I. Authority; Purposes of the FY 1999 SuperNOFA; Funding Amount; Eligible Applicants and Eligible Activities

(A) *Authority.* HUD's authority for making funding under this SuperNOFA is the Fiscal Year 1999 Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1999 (Pub.L. 105-276, 112 Stat. 2461, approved October 21, 1998) (FY 1999 HUD Appropriations Act).

(B) *Purposes.* The purposes of this SuperNOFA are to:

(1) *Make funding available to empower communities and residents.* The funding made available by this SuperNOFA will assist community residents, particularly the poor and disadvantaged, to develop viable communities and provide decent housing for all citizens, without discrimination.

(2) *Simplification of the application process for funding under HUD programs.* This year's SuperNOFA continues to provide a single, uniform set of rating factors and submission requirements. This year's SuperNOFA also allows, as did last year's, for you, the applicant, to apply for more than one program with a single application.

(3) *Promote comprehensive approaches to housing and community development.* Through the SuperNOFA process, HUD encourages you, the applicant, to focus on the interrelationships that exist in a community and in HUD's funding programs, and to build community-wide efforts that coordinate the resources of

multiple applicants and programs. The needs and problems of a community rarely, if ever, stand in isolation from each other. Due to this fact, it is very difficult to address these problems and to provide opportunities to use existing community resources in a piecemeal fashion. To successfully address community needs and solve community problems, and to take advantage of existing resources, HUD encourages members of a community to join together and pool all available resources in a common, coordinated effort. In 1998, HUD began structuring its funding process to help its community partners take this coordinated, holistic approach. Further, by making all of HUD's competitive funding available in one document, HUD allows you, the applicant, to be able to relate the activities proposed for funding under this SuperNOFA to the community's Consolidated Plan and Analysis of Impediments to Fair Housing Choice.

(C) *Funding Available.* As noted in the Introduction Section to the SuperNOFA, the HUD programs that are part of this SuperNOFA are allocated amounts based on appropriated funds. If HUD recaptures funds in any program, HUD reserves the right to increase the available funding amounts by the amount of funds recaptured.

(D) *Eligible Applicants and Eligible Activities.* The Programs Section of the SuperNOFA describes the eligible applicants and eligible activities for each program.

II. Requirements and Procedures Applicable to All Programs

Except as may be modified in the Programs Section of this SuperNOFA, or as noted within the specific provisions of this Section II, the principles listed below apply to all programs that are part of this SuperNOFA. Please be sure to read the Programs Section of the SuperNOFA for additional requirements or information.

(A) *Statutory Requirements.* To be eligible for funding under this SuperNOFA, you, the applicant, must meet all statutory and regulatory requirements that are applicable to the program or programs for which you are seeking funding. If you need copies of the program regulations, they are available from the SuperNOFA Information Center or through the Internet at the HUD web site located at <http://www.HUD.gov>. Among the reasons that HUD may reject an application from further funding consideration is if the activities or projects proposed in the application are not eligible activities and projects, or (with the exception of the Section 202

and 811 programs) HUD may eliminate the ineligible activities from funding consideration and reduce the grant amount accordingly.

(B) *Threshold Requirements—Compliance with Fair Housing and Civil Rights Laws.* With the exception of Federally recognized Indian tribes, all applicants and their subrecipients must comply with all Fair Housing and civil rights laws, statutes, regulations and executive orders as enumerated in 24 CFR 5.105(a). If you are a Federally recognized Indian tribe, you must comply with the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, and the Indian Civil Rights Act.

If you, the applicant —

(1) Have been charged with a systemic violation of the Fair Housing Act by the Secretary alleging ongoing discrimination;

(2) Are a defendant in a Fair Housing Act lawsuit filed by the Department of Justice alleging an ongoing pattern or practice of discrimination; or

(3) Have received a letter of noncompliance findings under Title VI, Section 504, or Section 109,—

HUD will not rank and rate your application under this SuperNOFA if the charge, lawsuit, or letter of findings has not been resolved to the satisfaction of the Department before the application deadline stated in the individual program NOFA. HUD's decision regarding whether a charge, lawsuit, or a letter of findings has been satisfactorily resolved will be based upon whether appropriate actions have been taken to address allegations of ongoing discrimination in the policies or practices involved in the charge, lawsuit, or letter of findings.

(C) *Additional Nondiscrimination Requirements.* You, the applicant and your subrecipients, must comply with the Americans with Disabilities Act, and Title IX of the Education Amendments Act of 1972.

(D) *Affirmatively Furthering Fair Housing.* Unless otherwise specified in the Programs Section of this SuperNOFA, if you are a successful applicant, you will have a duty to affirmatively further fair housing. Again, except as may be provided otherwise in the Programs Section of this SuperNOFA, you, the applicant, should include in your application or work plan the specific steps that you will take to:

(1) Address the elimination of impediments to fair housing that were identified in the jurisdiction's Analysis of Impediments (AI) to Fair Housing Choice;

(2) Remedy discrimination in housing; or

(3) Promote fair housing rights and fair housing choice.

Further, you, the applicant, have a duty to carry out the specific activities provided in your responses to the SuperNOFA rating factors that address affirmatively furthering fair housing. Please see the Programs Section of this SuperNOFA for further information.

(E) *Economic Opportunities for Low and Very Low-Income Persons (Section 3)*. Certain programs in this SuperNOFA require recipients of assistance to comply with section 3 of the Housing and Urban Development Act of 1968, 12 U.S.C. 1701u (Economic Opportunities for Low and Very Low-Income Persons in Connection with assisted Projects) and the HUD regulations at 24 CFR part 135, including the reporting requirements subpart E. Section 3 requires recipients to ensure that, to the greatest extent feasible, training, employment and other economic opportunities will be directed to (1) low and very low income persons, particularly those who are recipients of government assistance for housing and (2) business concerns which provide economic opportunities to low and very low income persons. As noted in the Programs Section of this SuperNOFA, Section 3 is applicable to the following programs:

1. Historically Black Colleges and Universities (HBCU);
2. Hispanic Serving Institutions Assisting Communities (HSIAC);
3. Lead-Based Paint Hazard Control;
4. Mold and Moisture Control in Inner City Housing Program;
5. HOPE VI Public Housing Revitalization;
6. Public Housing Drug Elimination Program (PHDEP);
7. Public Housing Drug Elimination Program—New Approaches
8. Multifamily Housing Drug Elimination;
9. Economic Development Initiative (EDI);
10. Brownfields Economic Development Initiative (BEDI);
11. Self-Help Homeownership Opportunity Program (SHOP);
12. Youthbuild;
13. Continuum of Care Homeless Assistance Programs;
14. Housing Opportunities for Persons with AIDS (HOPWA);
15. Section 202 Supportive Housing for the Elderly; and
16. Section 811 Supportive Housing for Persons with Disabilities.

(F) *Relocation*. Any person (including individuals, partnerships, corporations or associations) who moves from real property or moves personal property from real property directly (1) because of a written notice to acquire real property in whole or in part, or (2) because of the acquisition of the real property, in whole or in part, for a HUD-

assisted activity is covered by Federal relocation statute and regulations. Specifically, this type of move is covered by the acquisition policies and procedures and the relocation requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA), and the implementing governmentwide regulation at 49 CFR part 24. The relocation requirements of the URA and the governmentwide regulations cover any person who moves permanently from real property or moves personal property from real property directly because of rehabilitation or demolition for an activity undertaken with HUD assistance.

(G) *Forms, Certifications and Assurances*. You, the applicant, are required to submit signed copies of the standard forms, certifications, and assurances listed in this section, unless the requirements in the Programs Section specifies otherwise. Additionally, the Programs Section may specify additional forms, certifications, assurances or other information that may be required for a particular program in this SuperNOFA. As part of HUD's continuing efforts to improve the SuperNOFA process, several of the required standard forms have been simplified this year. The standard forms, certifications, and assurances are as follows:

- (1) Standard Form for Application for Federal Assistance (SF-424);
- (2) Standard Form for Budget Information—Non-Construction Programs (SF-424A) or Standard Form for Budget Information—Construction Programs (SF-424C), as applicable;
- (3) Standard Form for Assurances—Non-Construction Programs (SF-424B) or Standard Form for Assurances—Construction Programs (SF-424D), as applicable;
- (4) Drug-Free Workplace Certification (HUD-50070);
- (5) Certification and Disclosure Form Regarding Lobbying (SF-LLL); (Tribes and tribally designated housing entities (TDHEs) established by an Indian tribe as a result of the exercise of the tribe's sovereign power are not required to submit this certification. Tribes and TDHEs established under State law are required to submit this certification.)
- (6) Applicant/Recipient Disclosure Update Report (HUD-2880);
- (7) Certification that the applicant will comply with the requirements of the Fair Housing Act, Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, and will affirmatively further fair housing. CDBG recipients applying for funds under title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*) also must certify to compliance with section 109 of the Housing and Community Development Act. Federally recognized

Indian tribes must certify that they will comply with the requirements of the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, and the Indian Civil Rights Act.

(8) Certification required by 24 CFR 24.510. (The provisions of 24 CFR part 24 apply to the employment, engagement of services, awarding of contracts, subgrants, or funding of any recipients, or contractors or subcontractors, during any period of debarment, suspension, or placement in ineligibility status, and a certification is required.)

(H) *OMB Circulars*. Certain OMB circulars also apply to this SuperNOFA. The policies, guidance, and requirements of OMB Circular No. A-87 (Cost Principles Applicable to Grants, Contracts and Other Agreements with State and Local Governments), OMB Circular No. A-122 (Cost Principles for Nonprofit Organizations), 24 CFR part 84 (Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations) and 24 CFR part 85 (Administrative Requirements for Grants and Cooperative Agreements to State, Local, and Federally recognized Indian tribal governments) may apply to the award, acceptance and use of assistance under the programs of this SuperNOFA, and to the remedies for noncompliance, except when inconsistent with the provisions of the FY 1999 HUD Appropriations Act, other Federal statutes or the provisions of this SuperNOFA. Compliance with additional OMB Circulars may be specified for a particular program in the Programs Section of the SuperNOFA. Copies of the OMB Circulars may be obtained from EOP Publications, Room 2200, New Executive Office Building, Washington, DC 10503, telephone (202) 395-7332 (this is not a toll free number).

(I) *Environmental Requirements*. If you become a grantee under one of the programs in this SuperNOFA that assist physical development activities or property acquisition, you are generally prohibited from acquiring, rehabilitating, converting, leasing, repairing or constructing property, or committing or expending HUD or non-HUD funds for these types of program activities, until one of the following has occurred:

- (1) HUD has completed an environmental review in accordance with 24 CFR part 50; or
- (2) For programs subject to 24 CFR part 58, HUD has approved a grantee's Request for Release of Funds (HUD Form 7015.15) following a Responsible Entity's completion of an environmental review.

You, the applicant, should consult the Programs Section of the SuperNOFA for the applicable program to determine the

procedures for, timing of, and any exclusions from environmental review under a particular program. For applicants applying for funding under the Sections 202 or 811 Programs, please note the environmental review requirements for these programs.

(J) *Conflicts of Interest.* If you are a consultant or expert who is assisting HUD in rating and ranking applicants for funding under this SuperNOFA, you are subject to 18 U.S.C. 208, the Federal criminal conflict of interest statute, and the Standards of Ethical Conduct for Employees of the Executive Branch regulation published at 5 CFR part 2635. As a result, if you have assisted or plan to assist applicants with preparing applications for this SuperNOFA, you may not serve on a selection panel and you may not serve as a technical advisor to HUD for this SuperNOFA. All individuals involved in rating and ranking this SuperNOFA, including experts and consultants, must avoid conflicts of interest or the appearance of conflicts. Individuals involved in the rating and ranking of applications must disclose to HUD's General Counsel or HUD's Ethic Law Division the following information if applicable: the selection or non-selection of any applicant under this SuperNOFA will affect the individual's financial interests, as provided in 18 U.S.C. 208; or the application process involves a party with whom the individual has a covered relationship under 5 CFR 2635.502. The individual must disclose this information prior to participating in any matter regarding this SuperNOFA. If you have questions regarding these provisions or if you have questions concerning a conflict of interest, you may call the Office of General Counsel, Ethics Law Division, at 202-708-3815 and ask to speak to one of HUD's attorneys in this division.

III. Application Selection Process

(A) *Rating Panels.* To review and rate your applications, HUD may establish panels. These panels may include persons not currently employed by HUD. HUD may include these non-HUD employees to obtain certain expertise and outside points of view, including views from other Federal agencies.

(1) *Rating.* HUD will evaluate and rate all applications for funding that meet the threshold requirements and rating factors for award described in this SuperNOFA. The rating of you, as the "applicant," or of your organization, "the applicant's organization and staff," for technical merit or threshold compliance will include any sub-contractors, consultants, sub-recipients,

and members of consortia which are firmly committed to the project.

(2) *Ranking.* HUD will rank applicants within each program (or, for Continuum of Care applicants, across the three programs identified in the Continuum of Care section of this SuperNOFA). HUD will rank applicants only against other applicants that applied for the same program funding. Where there are set-asides within a program competition, you, the applicant, only will compete against applicants in the same set-aside competition.

(B) *Threshold Requirements.* HUD will review your application to determine whether your application meets all of the threshold requirements described in Section II(B), above. Only if your application meets all of the threshold requirements will it be eligible to be rated and ranked.

(C) *Factors For Award Used To Evaluate and Rate Applications.* For each program that is part of this SuperNOFA, the points awarded for the rating factors total 100. Depending upon the program for which you the applicant seek funding, the program may provide for up to four bonus points as provided in paragraphs (1) and (2) of this Section III(C).

(1) *Bonus Points.* The SuperNOFA provides for the award of up to two bonus points for eligible activities/projects that the applicant proposes to be located in high performing federally designated Empowerment Zones (EZs) or Enterprise Communities (ECs). To be eligible to receive the two bonus points, you must certify that the proposed activities/projects: (a) will be located in a Federally designated Empowerment Zone or Enterprise Community and will serve residents of the EZ/EC; and (b) are consistent with the strategic plan of the EZ/EC. If you provide this certification and HUD determines that the area is a high performing EZ/EC, as announced in HUD's list to be published in the **Federal Register** in March 1999, you will be awarded the two points. A listing of the high performing federally designated EZs/ECs will be available from the SuperNOFA Information Center, or through the HUD web site on the Internet at <http://www.HUD.gov>, as well as in the **Federal Register**.

(2) *Court-Ordered Consideration.* For any application submitted by the City of Dallas, Texas, for funds under this SuperNOFA for which the City of Dallas is eligible to apply, HUD will consider the extent to which the strategies or plans in the city's application or applications will be used to eradicate the vestiges of racial segregation in the Dallas Housing Authority's low income housing programs. The City of Dallas

should address the effect, if any, that vestiges of racial segregation in Dallas Housing Authority's low income housing programs have on potential participants in the programs covered by this NOFA, and identify proposed actions for remedying those vestiges. HUD may add up to 2 points to the score based on this consideration. This special consideration results from an order of the U.S. District Court for the Northern District of Texas, Dallas, Division. (This Section III(C)(2) is limited to applications submitted by the City of Dallas.)

(3) *The Five Standard Rating Factors.* Additional details about the five rating factors listed below, and the maximum points for each factor, are provided in the Programs Section of the SuperNOFA. You, the applicant, should carefully read the factors for award as described in the Programs Section of the SuperNOFA. HUD has established these five factors as the basic factors for award in every program that is part of this SuperNOFA. For a specific HUD program, however, HUD may have modified these factors to take into account specific program needs, or statutory or regulatory limitations imposed on a program. The standard factors for award, except as modified in the program area section are:

Factor 1: Capacity of the Applicant and Relevant Organizational Staff
Factor 2: Need/Extent of the Problem
Factor 3: Soundness of Approach
Factor 4: Leveraging Resources
Factor 5: Comprehensiveness and Coordination

The Continuum of Care Homeless Assistance Programs have only two factors that receive points: Need and Continuum of Care.

(D) *Negotiation.* After HUD has rated and ranked all applications and has made selections, HUD may require, depending upon the program, that all winners participate in negotiations to determine the specific terms of the grant agreement and budget. In cases where HUD cannot successfully conclude negotiations with a selected applicant or a selected applicant fails to provide HUD with requested information, an award will not be made to that applicant. In this instance, HUD may offer an award to the next highest ranking applicant, and proceed with negotiations with the next highest ranking applicant.

(E) *Adjustments to Funding.*

(1) HUD reserves the right to fund less than the full amount requested in your application to ensure the fair distribution of the funds and to ensure that the purposes of a specific program are met.

(2) HUD may choose not to fund any portion of your application that is not eligible for funding under specific program statutory or regulatory requirements, or which do not meet the requirements of this SuperNOFA or which may be duplicative of other funded programs or activities from previous years' awards. HUD may choose to fund only the eligible portions of your application.

(3) If funds remain after funding the highest ranking applications, HUD may fund part of the next highest ranking application in a given program. If you, the applicant, turn down the award offer, HUD will make the same determination for the next highest ranking application. If funds remain after all selections have been made, remaining funds may be available for other competitions for each program where there is a balance of funds.

(4) In the event HUD commits an error that, when corrected, would result in selection of an otherwise eligible applicant during the funding round of this SuperNOFA, HUD may select that applicant when sufficient funds become available.

(F) *Performance and Compliance Actions of Grantees.* HUD will measure and address the performance and compliance actions of grantees in accordance with the applicable standards and sanctions of their respective programs.

IV. Application Submission Requirements

As HUD discussed earlier in the introductory section of this SuperNOFA, part of the simplification of this funding process is to reduce the duplication of effort that has been required of applicants in the past. Before the SuperNOFA process, many of HUD's applicants were required to complete and submit similar applications for HUD funded programs. As the Program Chart above shows, the FY 1999 SuperNOFA provides, as did the FY 1998 SuperNOFA, for consolidated applications for several of the programs for which funding is available under this SuperNOFA.

V. Corrections to Deficient Applications

After the application due date, HUD may not, consistent with its regulations in 24 CFR part 4, subpart B, consider any unsolicited information you, the applicant, may want to provide. HUD may contact you, however, to clarify an item in your application or to correct technical deficiencies. You should note, however, that HUD may not seek clarification of items or responses that improve the substantive quality of your

response to any selection factors. In order not to unreasonably exclude applications from being rated and ranked, HUD may, however, contact applicants to ensure proper completion of the application and will do so on a uniform basis for all applicants.

Examples of curable (correctable) technical deficiencies include your failure to submit the proper certifications or your failure to submit an application that contains an original signature by an authorized official. In each case, HUD will notify you in writing by describing the clarification or technical deficiency. HUD will notify applicants by facsimile or by return receipt requested. You must submit clarifications or corrections of technical deficiencies in accordance with the information provided by HUD within 14 calendar days of the date of receipt of the HUD notification. If your deficiency is not corrected within this time period, HUD will reject your application as incomplete, and it will not be considered for funding. (Note that the Sections 202 and 811 Programs, by regulation, provide for appeal of rejection of an application on technical deficiency. Please see the Programs Sections for these programs for additional information and instructions.)

VI. Promoting Comprehensive Approaches to Housing and Community Development

(A) *General.* HUD believes the best approach for addressing community problems is through a community-based process that provides a comprehensive response to identified needs. By making these grant programs available in one document, applicants may be able to relate the activities proposed for funding under this SuperNOFA to the recent and upcoming NOFAs and the community's Consolidated Plan and Analysis of Impediments to Fair Housing Choice. There are certain HUD grant programs that are not part of this SuperNOFA (primarily those for which funding is allocated by lottery).

(B) *Linking Program Activities With AmeriCorps.* You are encouraged to link your proposed activities with AmeriCorps, a national service program engaging thousands of Americans on a full or part-time basis to help communities address their toughest challenges, while earning support for college, graduate school, or job training. For information about AmeriCorps, call the Corporation for National Service at (202) 606-5000.

(C) *Encouraging Visitability in New Construction and Substantial Rehabilitation Activities.* In addition to

applicable accessible design and construction requirements, you are encouraged to incorporate visitability standards where feasible in new construction and substantial rehabilitation projects. Visitability standards allow a person with mobility impairments access into the home, but do not require that all features be made accessible. Visitability means at least one entrance at grade (no steps), approached by an accessible route such as a sidewalk; the entrance door and all interior passage doors are at least 2 feet 10 inches wide, allowing 32 inches of clear passage space. Allowing use of 2'10" doors is consistent with the Fair Housing Act (at least for the interior doors), and may be more acceptable than requiring the 3 foot doors that are required in fully accessible areas under the Uniform Federal Accessibility Standards (UFAS) for a small percentage of units. A visitable home also serves persons without disabilities, such as a mother pushing a stroller, or a person delivering a large appliance. Copies of the UFAS are available from the SuperNOFA Information Center (1-800-HUD-2209) and also from the Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Room 5230, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 755-5404 or the TTY telephone number, 1-800-877-8399 (Federal Information Relay Service).

(D) *Developing Healthy Homes.* HUD's Healthy Homes Initiative is one of the initiatives developed by the White House Task Force on Environmental Health Risks and Safety Risks to Children that was established under Executive Order 13045 ("Protection of Children from Environmental Health Risks and Safety Risks"). HUD encourages the funding of activities (to the extent eligible under specific programs) that promote healthy homes, or that promote education on what is a healthy home. These activities may include, but are not limited to the following: educating homeowners or renters about the need to protect children in their home from dangers that can arise from items such as curtain cords, electrical outlets, hot water, poisons, fire, and sharp table edges, among others; incorporating child safety measures in the construction, rehabilitation or maintenance of housing, which include but are not limited to: child safety latches on cabinets, hot water protection devices, properly ventilated windows to protect from mold, window guards to protect children from falling, proper pest management to prevent cockroaches

which can cause asthma, and activities directed to control of lead-based paint hazards. The National Lead Information Hotline is 1-800-424-5323.

VII. Findings and Certifications

(A) Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of the General Counsel, Regulations Division, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500.

(B) Federalism, Executive Order 12612

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this SuperNOFA will not have substantial direct effects on States or their political subdivisions, or on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Specifically, the SuperNOFA solicits applicants to expand their role in addressing community development needs in their localities, and does not impinge upon the relationships between the Federal government and State and local governments. As a result, the SuperNOFA is not subject to review under the Order.

(C) Prohibition Against Lobbying Activities

You, the applicant, are subject to the provisions of section 319 of the Department of Interior and Related Agencies Appropriation Act for Fiscal Year 1991, 31 U.S.C. 1352 (the Byrd Amendment), which prohibits recipients of Federal contracts, grants, or loans from using appropriated funds for lobbying the executive or legislative branches of the Federal Government in connection with a specific contract, grant, or loan. You are required to certify, using the certification found at Appendix A to 24 CFR part 87, that you will not, and have not, used appropriated funds for any prohibited lobbying activities. In addition, you must disclose, using Standard Form LLL, "Disclosure of Lobbying Activities," any funds, other than

Federally appropriated funds, that will be or have been used to influence Federal employees, members of Congress, and congressional staff regarding specific grants or contracts. Tribes and tribally designated housing entities (TDHEs) established by an Indian tribe as a result of the exercise of the tribe's sovereign power are excluded from coverage of the Byrd Amendment, but tribes and TDHEs established under State law are not excluded from the statute's coverage.)

(D) Section 102 of the HUD Reform Act; Documentation and Public Access Requirements.

Section 102 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545) (HUD Reform Act) and the regulations codified in 24 CFR part 4, subpart A, contain a number of provisions that are designed to ensure greater accountability and integrity in the provision of certain types of assistance administered by HUD. On January 14, 1992 (57 FR 1942), HUD published a notice that also provides information on the implementation of section 102. The documentation, public access, and disclosure requirements of section 102 apply to assistance awarded under this SuperNOFA as follows:

(1) Documentation and public access requirements

HUD will ensure that documentation and other information regarding each application submitted pursuant to this SuperNOFA are sufficient to indicate the basis upon which assistance was provided or denied. This material, including any letters of support, will be made available for public inspection for a 5-year period beginning not less than 30 days after the award of the assistance. Material will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations in 24 CFR part 15.

(2) Disclosures

HUD will make available to the public for 5 years all applicant disclosure reports (HUD Form 2880) submitted in connection with this SuperNOFA. Update reports (also Form 2880) will be made available along with the applicant disclosure reports, but in no case for a period less than 3 years. All reports—both applicant disclosures and updates—will be made available in accordance with the Freedom of Information Act (5 U.S.C. 552) and HUD's implementing regulations at 24 CFR part 5.

(3) Publication of Recipients of HUD Funding

HUD's regulations at 24 CFR 4.7 provide that HUD will publish a notice in the **Federal Register** on at least a quarterly basis to notify the public of all decisions made by the Department to provide:

(i) Assistance subject to section 102(a) of the HUD Reform Act; or

(ii) Assistance that is provided through grants or cooperative agreements on a discretionary (non-formula, non-demand) basis, but that is not provided on the basis of a competition.

(E) Section 103 HUD Reform Act

HUD's regulations implementing section 103 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3537a), codified in 24 CFR part 4, apply to this funding competition. The regulations continue to apply until the announcement of the selection of successful applicants. HUD employees involved in the review of applications and in the making of funding decisions are limited by the regulations from providing advance information to any person (other than an authorized employee of HUD) concerning funding decisions, or from otherwise giving any applicant an unfair competitive advantage. Persons who apply for assistance in this competition should confine their inquiries to the subject areas permitted under 24 CFR part 4.

Applicants or employees who have ethics related questions should contact the HUD Ethics Law Division at (202) 708-3815. (This is not a toll-free number.) For HUD employees who have specific program questions, the employee should contact the appropriate field office counsel, or Headquarters counsel for the program to which the question pertains.

VIII. The FY 1999 SuperNOFA Process and Future HUD Funding Processes

In FY 1998, Secretary Cuomo took the first significant step in changing HUD's funding process to better promote comprehensive, coordinated approaches to housing and community development by developing the SuperNOFA process. The three SuperNOFAs published in FY 1998 reflected a marked improvement over HUD's previous funding process and assisted communities to make better use of available resources through a coordinated approach.

This FY 1999 SuperNOFA takes HUD's funding process to the next step—a single SuperNOFA. The FY 1999 SuperNOFA was developed based on comments received from HUD clients and the Department believes it

represents a significant improvement over HUD's approach to the funding process in prior years. For FY 2000, HUD may take even further steps to enhance this process. HUD welcomes comments from applicants and other members of the public on this process, and how it may be improved in future years.

The description of programs for which funding is available under this SuperNOFA follows.

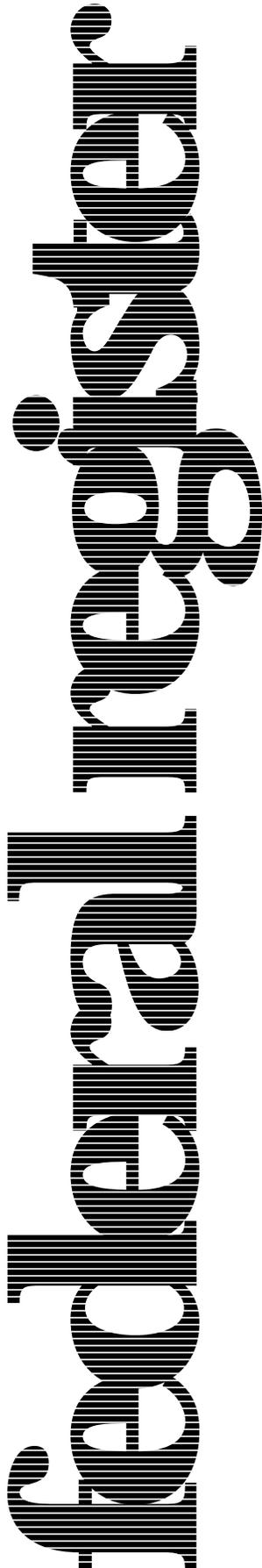
Dated: May 13, 1999.

Saul N. Ramirez, Jr.,

Deputy Secretary.

[FR Doc. 99-12518 Filed 5-13-99; 4:24 pm]

BILLING CODE 4210-32-P



Tuesday
May 18, 1999

Part V

**Department of
Commerce**

Bureau of Export Administration

15 CFR Part 734, et al.
Implementation of the Chemical Weapons
Convention; Revisions to the Export
Administration Regulations; Final Rule

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 734, 736, 738, 740, 742, 745, 748, 758, 772 and 774

[Docket No. 990416098-9098-01]

RIN 0694-AB67

Implementation of the Chemical Weapons Convention; Revisions to the Export Administration Regulations

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Interim rule.

SUMMARY: On April 25, 1997, the United States ratified the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention). The CWC identifies Schedule 1, Schedule 2 and Schedule 3 chemicals subject to certain trade restrictions. This interim rule implements the provisions of the Convention that affect exports and reexports of Schedule 1 chemicals and exports of Schedule 2 and Schedule 3 chemicals to countries that are not party to the Convention (non-States Parties) by amending the Export Administration Regulations (EAR). Specifically, this rule adds a requirement for U.S. persons to obtain an End-Use Certificate for exports of certain chemicals to those countries that are not party to the Convention, and submit a copy of that certificate to the Department of Commerce. This rule also adds licensing requirements for technology for the production of certain Schedule 2 and Schedule 3 chemicals subject to the Export Administration Regulations, and creates an advance notification and annual report requirement for all exports of Schedule 1 chemicals. To facilitate verification measures by the Organization for the Prohibition on Chemical Weapons (OPCW), this rule modifies an existing License Exception to permit the release of technology to the OPCW during inspections of chemical facilities in the United States and to permit the export or reexport of equipment for use in inspections in countries party to the Convention.

DATES: This rule is effective May 18, 1999. Comments on this rule must be received on or before June 17, 1999. Annual reports for exports of Schedule 1 chemicals during calendar years 1997 and 1998 must be received by the Department of Commerce by August 16, 1999.

ADDRESSES: Written comments should be sent to Nancy Crowe, Regulatory Policy Division, Bureau of Export Administration, Room 2705, 14th Street and Pennsylvania Ave., NW, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Nancy Crowe, Regulatory Policy Division, Bureau of Export Administration, at (202) 482-2440.

SUPPLEMENTARY INFORMATION:

Background

As a party to the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention), the United States must, among other obligations, subject certain toxic chemicals and their precursors listed in the Convention to verification measures and control. This rule implements certain export-related provisions of the Convention. Regulations to implement other provisions of the Convention related to data declarations and inspections will be published by the Department of Commerce in the **Federal Register** at a later date.

The CWC-related toxic chemicals and their precursors are contained in three lists or "schedules." CWC Schedule 1 chemicals and precursors are those that have been developed, produced, stockpiled, or used as chemical weapons in the past, or that have high potential for use as chemical weapons, possess lethal or incapacitating toxicity, or may be used as precursors in the production of other Schedule 1 chemicals.

CWC Schedule 2 lists toxic chemicals and precursors that are not produced in large commercial quantities and that possess lethal or incapacitating toxicity that could enable them to be used as chemical weapons, may be used as precursors in one of the chemical reactions at the final stage of formation of a chemical listed in Schedule 1 or Schedule 2, or are important in the production of Schedule 1 or Schedule 2 chemicals.

CWC Schedule 3 lists toxic chemicals that may be produced in large commercial quantities for purposes not prohibited under the Convention and that have been produced, stockpiled, or used as chemical weapons, possess lethal or incapacitating toxicity that could enable them to be used as chemical weapons, or are important in the production of one or more chemicals listed in Schedule 1 or Schedule 2.

The Convention mandates trade restrictions on individual chemicals and

families of chemicals. The United States is a participant in the Australia Group (AG), a 30-nation multilateral chemical and biological weapons non-proliferation regime. All AG participants have national export controls on 54 precursor chemicals, some of which are listed on the CWC Schedules, and on chemical-related production equipment. Two Schedule 1 toxins, ricin and saxitoxin, are subject to the EAR, are listed in Export Control Classification Number (ECCN) 1C351 on the Commerce Control List (CCL), and currently require a license for chemical and biological (CB) non-proliferation reasons for export to all destinations except Canada. Three additional Schedule 1 chemicals, O-Ethyl-2-diisopropylaminoethyl methyl phosphonite (57856-11-8), Ethylphosphonyl difluoride (753-98-0) and Methylphosphonyl difluoride (676-99-3), are controlled by ECCN 1C350, and currently require a license for CB reasons for export to all destinations except AG-member countries. As a result of this rule, all five Schedule 1 chemicals subject to the EAR will require a license to all destinations, including Canada. All other Schedule 1 chemicals are considered defense articles under U.S. law and, as such, are controlled by the Department of State under the International Traffic in Arms Regulations (ITAR), (22 CFR 120, 121.7).

This rule establishes a new reason for control, "Chemical Weapons Convention", or CW, in Control Policy—Commerce Control List Based Controls (part 742 of the EAR). New § 742.18, sets forth the licensing requirements and policies for this new control, and applies to Schedule 1 chemicals identified under ECCNs 1C350 and 1C351 and Schedule 2 and Schedule 3 chemicals identified under ECCN 1C350 and new ECCN 1C355, and to technology identified under new ECCN 1E355.

New § 742.18 reflects the requirements of the Convention. Under the Convention, Schedule 1 chemicals may only be exported to other States Parties. States Parties exporting Schedule 1 chemicals must provide advance notification of exports of any quantity of a Schedule 1 chemical, and must submit annual reports of exports of such chemicals during the previous calendar year. The Convention also requires that prior to the export of a Schedule 2 or Schedule 3 chemical to a non-State Party, the exporter obtain an End-Use Certificate issued by the government of the importing country. No Schedule 2 chemical may be exported to a non-State Party after April

29, 2000. Specifically, this rule amends the EAR in the following ways:

Schedule 1 Chemical Requirements

Export license requirements for Schedule 1 chemicals. This rule imposes a license requirement for CW reasons for exports of CWC Schedule 1 chemicals controlled under ECCN 1C350.a.20, a.24, and a.31 and ECCN 1C351.d.5 and d.6. to all countries, including Canada. Reexports of Schedule 1 chemicals are prohibited. Note that since exports of Schedule 1 chemicals are controlled for more than one reason, licenses for such chemicals will be reviewed under the license review policy for all applicable reasons for control, including the license review policy set forth in § 742.2 and new § 742.18 of the EAR.

Advance notification and annual reporting of exports of Schedule 1 chemicals. This rule adds a new part 745 for CWC advance notification and certain other reporting requirements. Section 745.1 sets forth the notification and reporting requirements for exports of all Schedule 1 chemicals listed in new Supplement No. 1 to part 745. You must notify BXA at least 45 calendar days prior to exporting any quantity of a Schedule 1 chemical to another State Party. The advance notification requirement is in addition to the export license required for Schedule 1 chemicals controlled under ECCNs 1C350 or 1C351 and §§ 742.2 and 742.18 of the EAR, and for other Schedule 1 chemicals controlled by the State Department's International Traffic in Arms Regulations. You must also submit annual reports to BXA of all exports of any quantity of a Schedule 1 chemical to another State Party during the previous calendar year, starting with exports taking place during calendar year 1997. Annual reports for exports of Schedule 1 exports during calendar years 1997 and 1998 are due to the Department of Commerce August 16, 1999. If you exported Schedule 1 chemicals in calendar year 1997 and 1998, two reports are due by August 16, 1999. Thereafter, annual reports are due to the Department of Commerce by February 13th of each year. For example, annual reports for exports that were made during calendar year 1999 are due on February 13, 2000.

Schedule 2 and Schedule 3 Chemical Requirements

End-Use Certificate requirements for exports of Schedule 2 and Schedule 3 chemicals to countries that are not CWC States Parties. This rule adds to new § 745.2 a requirement for U.S. persons, as defined in § 744.6(c) of the EAR, to

obtain an End-Use Certificate from the government of the importing country and submit a copy of the End-Use Certificate to the Department of Commerce within 7 days of the date of export. This Certificate must be issued by the foreign government's agency responsible for foreign affairs or any other agency or department designated by the importing government for this purpose, and may be issued to cover aggregate quantities against which multiple shipments may be made to a single consignee. An End-Use Certificate covering multiple shipments may be used until the aggregate quantity is shipped. New Supplement No. 1 to part 745 includes a list of Schedule 2 and Schedule 3 chemicals subject to the End-Use Certificate requirement, and new Supplement No. 2 to part 745 includes a list of States Parties. New Supplement No. 3 to part 745 of the EAR includes foreign government agencies responsible for issuing End-Use Certificates. Additional foreign government entities will be added to Supplement No. 3 to part 745 when known.

An End-Use Certificate is required for exports of Schedule 2 and Schedule 3 chemicals to countries not included in Supplement No. 2 to part 745. Note that the End-Use Certificate requirement set forth in § 745.2 of the EAR applies to all Schedule 2 and Schedule 3 chemicals regardless of whether the chemical is subject to the export license requirements under the EAR or the International Traffic in Arms Regulations (ITAR). Note also that the End-Use Certificate requirement is in addition to any export license requirement under either the EAR or the ITAR.

License requirements. This rule imposes a license requirement for exports of Schedule 2 and Schedule 3 chemicals controlled for CW reasons under ECCNs 1C350 and 1C355, including sample shipments of such chemicals, to non-States Parties when an End-Use Certificate is not obtained. Such applications will generally be denied. Further, this rule imposes a license requirement for exports of Schedule 2 chemicals to non-States Parties on or after April 29, 2000, and imposes a general policy of denial for such exports.

Exports of technology to produce certain Schedule 2 and Schedule 3 chemicals. This rule adds to the CCL new ECCN 1E355 to control technology to produce PFIB, phosgene, cyanogen chloride and hydrogen cyanide. This rule also imposes a license requirement for CW reasons for exports and reexports of such technology when

destined to non-States Parties, except for Israel and Taiwan. Applications for such exports and reexports will be considered on a case-by-case basis. Note that once countries become State Parties, they will be eligible to receive production technology controlled under 1E355 without a license.

This interim rule also imposes anti-terrorism controls on technology controlled under ECCN 1E355 for Iran, Sudan and Syria, consistent with the provisions of the Export Administration Act after consultation with the Secretary of State.

Exports and reexports of equipment for use in inspections conducted by the OPCW and for the release of technology to the OPCW during inspections. This rule also revises License Exception GOV to permit the export and reexport of equipment for use in inspections in countries party to the Convention, and to permit the release of technology to the Organization for the Prohibition of Chemical Weapons (OPCW) during inspections of chemical facilities in the United States pursuant to the Convention. These exports and reexports are authorized only for the Organization for the Prohibition of Chemical Weapons (OPCW) for official international inspection and verification use under the terms of the Convention. This License Exception is available only on the condition that the information is strictly protected in accordance with applicable provisions of the EAR and other U.S. laws regarding the use and retransfer of U.S. goods and services. License Exception GOV does not authorize export of inspection samples. No samples collected in the United States pursuant to a CWC inspection may be transferred for analysis to any laboratory outside the United States.

This rule also makes conforming changes in § 734.5—Activities of U.S. and foreign persons subject to the EAR; § 736.2—General Prohibitions; and § 748.2—Unique license application requirements. Finally, this rule also revises the Shipper's Export Declaration (SED) provisions of § 758.3 to require exporters to enter the ECCN on the SED when exporting chemicals controlled under ECCN 1C355 under No License Required (NLR).

The Bureau of Export Administration submitted a foreign policy report to the Congress April 13, 1999 indicating the imposition of new foreign policy controls.

Although the Export Administration Act (EAA) expired on August 20, 1994, the President invoked the International Emergency Economic Powers Act and continued in effect the EAR, and, to the extent permitted by law, the provisions

of the EAA in Executive Order 12924 of August 19, 1994, extended by Presidential notice of August 13, 1998 (63 FR 55121, August 17, 1998).

Savings Clause

Shipments of items now subject to a licensing, advance notification or End-Use Certificate requirement as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export pursuant to actual orders for export before May 18, 1999 may be exported without a license up to and including June 1, 1999. Any such items not actually exported before midnight June 1, 1999, require a license or are subject to the advance notification or End-Use Certificate requirements in accordance with this regulation.

Rulemaking Requirements

1. This interim rule has been determined to be not significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Number. This rule involves a collection of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). These collections have been approved by the Office of Management and Budget under control number 0694-0088. This rule also contains two new information collection requirements subject to the PRA that has received emergency approval under OMB control number 0694-0117. The new information requirement and estimated public burden hours include: Preparing and submitting to BXA Schedule 1 notifications and annual reports (30 minutes each); obtaining the End-Use Certificate from the government of the importing destination; transmitting it to the exporter, and submitting it to BXA (30 minutes). These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be

collected; and (d) ways to minimize the burden of the collection of information on respondents, including, the use of automated collection techniques or other forms of information technology. Please send any comments to regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to OMB Desk Officer, New Executive Office Building, Washington, DC 20503.

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (Sec. 5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this interim rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. or by any other law, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

However, because of the importance of the issues raised by these regulations, this rule is issued in interim final form and comments will be considered in the development of final regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close June 17, 1999. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection

and copying. In the interest of accuracy and completeness, the Department requires comments in written form.

Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 6881, Department of Commerce, 14th Street and Pennsylvania Avenue, NW, Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from Henry Gaston, Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 482-0500.

List of Subjects

15 CFR Part 734

Administrative practice and procedure, Exports, Foreign trade.

15 CFR Parts 736, 738, 742, 772 and 774

Exports, Foreign trade.

15 CFR Part 745

Administration practice and procedure, Chemicals, Exports, Foreign trade, Reporting and recordkeeping requirements.

15 CFR Parts 740, 748 and 758

Administrative practice and procedure, Exports, Foreign trade, Reporting and recordkeeping requirements.

Accordingly, parts 734, 736, 738, 740, 742, 772 and 774 of the Export Administration Regulations (15 CFR Parts 730-799) are amended, and new part 745 is added, to read as follows:

1. The authority citation for part 734 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 1701 *et seq.*; E.O. 12924, 3 CFR, 1994 Comp., p. 917; E.O. 12938, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 3 CFR, 1996 Comp., p. 228; Notice of August 13, 1998, 63 FR 44121, 3 CFR, 1999 Comp., p. 294.

2. The authority citation for part 736 is amended to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 1701 *et seq.*; E.O. 12924, 3 CFR, 1994 Comp., p. 917; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 3 CFR, 1996 Comp., p. 228; Notice of August 13, 1998, 63 FR 44121, 3 CFR, 1999 Comp., p. 294.

3. The authority citations for parts 738 and 774 are revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*, 1701 *et seq.*, app 5; 10 U.S.C. 7420, 7430(e); 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 287c; 22 U.S.C. 3201 *et seq.*, 6004; Sec. 201, Pub. L. 104-58, 109 Stat. 557 (30 U.S.C. 185(s), 185(u)); 42 U.S.C. 2139a, 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; E.O. 12924, 3 CFR, 1994 Comp., p. 917; E.O. 13026, 3 CFR, 1996 Comp., p. 228; Notice of August 13, 1998, 63 FR 44121, 3 CFR, 1999 Comp., p. 294.

4. The authority citation for parts 740 and 772 are revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*, 1701 *et seq.*; E.O. 12924, 1994, 3 CFR, 1994 Comp., p. 917; E.O. 13026, 3 CFR, 1996 Comp., p. 228 (1997); Notice of August 13, 1998, 63 FR 44121, 3 CFR, 1999 Comp., p. 294; Pub. L. 105-85, 111 Stat. 1629.

5. The authority citation for part 742 is amended to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*, 1701 *et seq.*; 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 3 CFR, 1993 Comp., p. 608; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; E.O. 12938, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 3 CFR, 1996 Comp., p. 228; Notice of August 13, 1998, 63 FR 44121, 3 CFR, 1999 Comp., p. 294.

6. The authority citation for part 758 is revised to read as follows

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12924, 3 CFR, 1994 Comp., p. 917; Notice of August 13, 1998, 63 FR 44121, 3 CFR, 1999, Comp., p. 294.

PART 734—AMENDED

7. Section 734.5 is amended by revising paragraph (a) to read as follows:

§ 734.5 Activities of U.S. and foreign persons subject to the EAR.

* * * * *

(a) Certain activities of U.S. persons related to the proliferation of chemical or biological weapons or of missile technology as described in § 744.6 of the EAR and the proliferation of chemical weapons as described in part 745 of the EAR.

* * * * *

PART 736—AMENDED

8.–9. Section 736.2 is amended by revising paragraph (b)(7)(i) to read as follows:

§ 736.2 General prohibitions and determination of applicability.

(a) * * *

(b) * * *

(7) *General Prohibition Seven—Support of proliferation activities (U.S. person proliferation activity).*—(i) *Support of proliferation activities (U.S. person proliferation activity).* (A) If you are a U.S. person as that term is defined in § 744.6(c) of the EAR, you may not engage in any activities prohibited by § 744.6(a) or (b) of the EAR, which prohibits the performance, without a license from BXA, of certain financing, contracting, service, support, transportation, freight forwarding, or employment that you know will assist in certain proliferation activities described further in part 744 of the EAR. There are no License Exceptions to this General Prohibition Seven in part 740 of the EAR unless specifically authorized in that part.

(B) If you are a U.S. person as that term is defined in § 744.6(c) of the EAR, you may not export a Schedule 2 or Schedule 3 chemical listed in Supplement No. 1 to part 745 to a destination not listed in Supplement No. 2 to part 745 without first submitting to the Department of Commerce a copy of the End-Use Certificate as required in § 745.2 of the EAR.

(C) If you are a U.S. person as that term is defined in § 744.6(c) of the EAR, you may not export a Schedule 1 chemical listed in Supplement No. 1 to part 745 without first complying with the provisions of §§ 742.16 and 745.2 of the EAR.

* * * * *

PART 738—AMENDED

10. Section 738.2 is amended by adding “CW Chemical Weapons Convention” in alphabetical order to the list of Reasons for Control in paragraph (d)(2)(i)(A).

PART 740—AMENDED

11. Section 740.11 is amended by revising the heading and introductory text and by adding new paragraph (c) to read as follows:

§ 740.11 Governments, international organizations, and international inspections under the Chemical Weapons Convention (GOV).

This License Exception authorizes exports and reexports for international nuclear safeguards; U.S. government agencies or personnel, and agencies of cooperating governments; and

international inspections under the Chemical Weapons Convention.

* * * * *

(c) *International inspections under the Chemical Weapons Convention (CWC or Convention).*

(1) The provisions of this paragraph (c) authorize exports and reexports to the Organization for the Prohibition of Chemical Weapons (OPCW) and exports and reexports by the OPCW for official international inspection and verification use under the terms of the Convention. The OPCW is an international organization that establishes and administers an inspection and verification regime under the Convention designed to ensure that certain chemicals and related facilities are not diverted from peaceful purposes to non-peaceful purposes. These provisions authorize exports and reexports for official OPCW use of the following:

(i) Commodities and software consigned to the OPCW at its headquarters in The Hague for official international OPCW use for the monitoring and inspection functions set forth in the Convention, and technology relating to the maintenance, repair, and operation of such commodities and software. The OPCW must maintain effective control of such commodities, software and technology.

(ii) Controlled technology relating to the training of the OPCW inspectorate.

(iii) Controlled technology relating to a CWC inspection site, including technology released as a result of:

(A) Visual inspection of U.S.-origin equipment or facilities by foreign nationals of the inspection team;

(B) Oral communication of controlled technology to foreign nationals of the inspection team in the U.S. or abroad; and

(C) The application to situations abroad of personal knowledge or technical experience acquired in the U.S.

(2) *Exclusions.* The following items may not be exported or reexported under the provisions of this paragraph (c):

(i) Computers with a Composite Theoretical Performance (CTP) greater than 10,000 MTOPS, except that no MTOPS limit applies to exports or reexports to those countries in Computer Tier 1 (see § 740.7(b)(1));

(ii) Inspection samples collected in the U.S. pursuant to the Convention; and

(iii) Commodities and software that are no longer in OPCW official use. Such items must be disposed of in accordance with the EAR.

(3) *Confidentiality*. The application of the provisions of this paragraph (c) is subject to the condition that the confidentiality of business information is strictly protected in accordance with applicable provisions of the EAR and other U.S. laws regarding the use and retransfer of U.S. goods and services.

PART 742—AMENDED

12. Section 742.2 is amended by revising the introductory text to paragraph (a) to read as follows:

§ 742.2 Proliferation of chemical and biological weapons.

(a) *License requirements*. The following controls are maintained in support of the U.S. foreign policy of opposing the proliferation and illegal use of chemical and biological weapons. (See also § 742.16 of this part for license requirements pursuant to the Chemical Weapons Convention).

* * * * *

§ 742.8 [Amended]

13. Section 742.8 is amended by revising the phrase “paragraphs (c)(6) through (c)(39)” in paragraph (a)(4)(ii) to read “paragraphs (c)(6) through (c)(41)”.

§ 742.9 [Amended]

14. Section 742.9 is amended by revising the phrase “(c)(22) through (c)(39)” in paragraph (a)(3)(ii) to read “(c)(22) through (c)(41)”.

§ 742.10 [Amended]

15. Section 742.10 is amended by revising the phrase “(c)(16) through (c)(39)” in paragraph (a)(4)(ii) to read “(c)(16) through (c)(41)”.

16. Part 742 is amended by adding a new § 742.18 to read as follows:

§ 742.18 Chemical Weapons Convention (CWC or Convention).

States that are party to the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, also known as the Chemical Weapons Convention (CWC or Convention), undertake never to develop, produce, acquire, stockpile, transfer, or use chemical weapons. As a State Party to the Convention, the United States is subjecting certain toxic chemicals and their precursors listed in Schedules within the Convention to trade restrictions. Trade restrictions include a prohibition on the export of Schedule 1 chemicals to non-States Parties, license requirements for the export of Schedule 1 chemicals to all States Parties, End-Use Certificate requirements for exports of Schedule 2 and Schedule 3 chemicals to non-States

Parties, and a prohibition on the export of Schedule 2 chemicals to non-States Parties on or after April 29, 2000.

(a) *License requirements*. (1) *Schedule 1 chemicals identified in ECCNs 1C350 and 1C351*. A license is required for CW reasons for exports and reexports of Schedule 1 chemicals identified under ECCN 1C350.a.20, a.24, and a.31 and ECCN 1C351.d.5 and d.6 to all destinations *including* Canada. Also see the advance notification procedures and annual reporting requirements described in § 745.1 of the EAR.

(2) *Schedule 2 and Schedule 3 chemicals*. (i) *ECCN 1C350*. For all chemicals included in ECCN 1C350, other than 1C350.a.20, a.24 and a.31, a license is required for CW reasons unless an End-Use Certificate is obtained as described in § 745.2 of the EAR for exports to destinations *not* listed in Supplement No. 2 to part 745 of the EAR.

(ii) *ECCN 1C355*. Chemicals controlled under ECCN 1C355 are controlled for CW reasons. The following license requirements apply:

(A) *CWC States Parties*. Neither a license nor an End-Use Certificate is required for exports to CWC States Parties (destinations listed in Supplement No. 2 to part 745 of the EAR) for CW reasons. Note that a license may be required for other reasons set forth in the EAR. See in particular the end-use/end-user restrictions of part 744 and the restrictions that apply to embargoed countries in part 746 of the EAR.

(B) *CWC Non-States Parties*. A license is required for exports to non-States Parties (destinations not listed in Supplement No. 2 to part 745 of the EAR) for CW reasons unless the exporter obtains an End-Use Certificate described by § 745.2 of the EAR. Note that a license may be required for other reasons set forth in the EAR. See in particular the end-use/end-user restrictions of part 744 and the restrictions that apply to embargoed countries in part 746 of the EAR.

(iii) *Exports of Schedule 2 chemicals on or after April 29, 2000*. A license is required for CW reasons for exports of Schedule 2 chemicals listed in 1C350 and 1C355 when exported to non-States Parties on or after April 29, 2000, regardless whether the exporter has obtained an End-Use Certificate described in § 745.2 of the EAR.

(3) *Technology controlled under ECCN 1E355*. A license is required to non-States Parties (destinations not listed in Supplement No. 2 to part 745 of the EAR), except for Israel and Taiwan, for CW reasons.

(b) *Licensing policy*. (1) *Schedule 1 chemicals*. (i) Applications to export Schedule 1 chemicals to States Parties (destinations listed in Supplement No. 2 to part 745 of the EAR) will generally be approved, provided that all of the following conditions are met:

(A) The chemicals are destined for purposes not prohibited under the CWC (e.g., research, medical, pharmaceutical, or protective purposes);

(B) The types and quantities of chemicals are strictly limited to those that can be justified for those purposes;

(C) The aggregate amount of Schedule 1 chemicals in the country of destination at any given time for such purposes is equal to or less than one metric ton and receipt of the proposed export or reexport will not cause the limit to be exceeded.

(ii) Applications to export Schedule 1 chemicals to non-States Parties (destinations *not* listed in Supplement No. 2 to part 745 of the EAR) will generally be denied.

(iii) Applications to reexport Schedule 1 chemicals will generally be denied.

(2) *Schedule 2 and Schedule 3 chemicals*. (i) *CWC States Parties*. Applications to export and reexport Schedule 2 and Schedule 3 chemicals controlled under ECCN 1C350 to States Parties (destinations listed in Supplement No. 2 to part 745 of the EAR) will generally be approved to satisfactory end-users, provided the chemicals will only be used for purposes not prohibited by the CWC.

(ii) *CWC non-States Parties*. (A) *ECCN 1C350*. Applications to export Schedule 2 chemicals prior to April 29, 2000, and Schedule 3 Schedule chemicals controlled under ECCN 1C350 to CWC non-States Parties (destinations *not* listed in Supplement No. 2 to part 745 of the EAR) will generally be approved to satisfactory end-users, provided the chemicals will only be used for purposes not prohibited by the CWC (see paragraph (b)(2)(iv) of this section), when the exporter has obtained the End-Use Certificate required and described in § 745.2 of the EAR. If no end-user certificate is obtained, the application will generally be denied.

(B) *ECCN 1C355*. Applications to export Schedule 2 and Schedule 3 chemicals controlled under ECCN 1C355 will generally be denied.

(C) *Exports of Schedule 2 chemicals on or after April 29, 2000*. Applications to export Schedule 2 chemicals controlled under 1C350 and 1C355 to non-States Parties (destinations not listed in Supplement No. 2 to part 745 of the EAR) on or after April 29, 2000, will generally be denied.

(iii) Purposes not prohibited under the CWC include:

(A) Industrial, agricultural, research, medical, pharmaceutical, or other peaceful purposes; and

(B) Law enforcement purposes.

(3) *Technology controlled under ECCN 1E355.* Exports and reexports of technology controlled under ECCN 1E355 will be reviewed on a case-by-case basis.

(c) *Contract sanctity.* Contract sanctity provisions are not available for license applications reviewed under this section.

17-18. Supplement No. 2 to part 742 is amended by adding new paragraphs (c)(40) and (c)(41) to read as follows:

Supplement No. 2 To Part 742—Anti-Terrorism Controls: Iran, Syria and Sudan Contract Sanctity Dates and Related Policies

* * * * *

(c) * * *

(40) [Reserved]

(41) Production technology controlled under ECCN 1C355 on the CCL.

(i) *Iran.* Applications for all end-users in Iran of these items will generally be denied.

(ii) *Syria.* Applications for military end-users or for military end-uses in Syria of these items will generally be denied. Applications for non-military end-users or for non-military end-uses in Syria will be considered on a case-by-case basis.

(iii) *Sudan.* Applications for all end-users in Sudan of these items will generally be denied.

PART 745—[ADDED]

19. New Part 745 is added to read as follows:

PART 745—CHEMICAL WEAPONS CONVENTION REQUIREMENTS

Sec.

§ 745.1 Advance notification and annual report of all exports of Schedule 1 chemicals to other States Parties.

§ 745.2 End-Use Certificate reporting requirements under the Chemical Weapons Convention.

Supplement No. 1 to Part 745—Schedules of Chemicals

Supplement No. 2 to Part 745—States Parties to the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction

Authority: 50 U.S.C. 1701 et seq.; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; Notice of August 13, 1998, 63 FR 44121, 3 CFR, 1999 Comp., p. 294.

§ 745.1 Advance notification and annual report of all exports of Schedule 1 chemicals to other States Parties.

Pursuant to the Convention, the United States is required to notify the Organization for the Prohibition of Chemical Weapons (OPCW) not less than 30 days in advance of every export of a Schedule 1 chemical, in any quantity, to another State Party. In addition, the United States is required to provide a report of all exports of Schedule 1 chemicals to other States Parties during each calendar year. If you plan to export any quantity of a Schedule 1 chemical controlled under the EAR and licensed by the Department of Commerce or controlled under the International Traffic in Arms Regulations (ITAR) and licensed by the Department of State, you are required under this section to notify the Department of Commerce in advance of this export. You are also required to provide an annual report of exports that actually occurred during the previous calendar year. The United States will transmit the advance notifications and an aggregate annual report to the OPCW of exports of Schedule 1 chemicals from the United States. Note that the notification and annual report requirements of this section do not relieve the exporter of any requirement to obtain a license from the Department of Commerce for the export of Schedule 1 chemicals subject to the EAR or from the Department of State for the export of Schedule 1 chemicals subject to the ITAR.

(a) *Advance notification of exports.* You must notify BXA at least 45 calendar days prior to exporting any quantity of a Schedule 1 chemical listed in Supplement No. 1 to this part to another State Party. This is in addition to the requirement to obtain an export license under the EAR for chemicals controlled by ECCN 1C350 or 1C351 for any reason for control, or from the Department of State for Schedule 1 chemicals controlled under the ITAR. Note that such notifications may be sent to BXA prior to or after submission of a license application to BXA for Schedule 1 chemicals controlled subject to the EAR and under ECCNs 1C350 or 1C351 or to the Department of State for Schedule 1 chemicals controlled on the ITAR. Such notices must be submitted separately from license applications.

(1) Such notification should be on company letterhead or must clearly identify the reporting entity by name of company, complete address, name of contact person and telephone and fax numbers, along with the following information:

(i) Common Chemical Name;

(ii) Structural formula of the chemical;

(iii) Chemical Abstract Service (CAS) Registry Number;

(iv) Quantity involved in grams;

(v) Planned date of export;

(vi) Purpose (end-use) of export;

(vii) Name of recipient;

(viii) Complete street address of recipient;

(ix) Export license or control number, if known; and

(x) Company identification number, once assigned by BXA.

(2) Send the notification by fax to (703) 235-1481 or to the following address, for mail and courier deliveries: Information Technology Team, Department of Commerce, Bureau of Export Administration, 1555 Wilson Boulevard, Suite 710, Arlington, VA 22209. Attn: "Advance Notification of Schedule 1 Chemical Export".

(3) Upon receipt of the notification, BXA will inform the exporter of the earliest date the shipment may occur under the notification procedure. To export the Schedule 1 chemical, the exporter must have applied for and been granted a license (see §§ 742.2 and 742.18 of the EAR, or the ITAR at 22 CFR part 121.

(b) *Annual report of exports.* (1) You must report all exports of any quantity of a Schedule 1 chemical to another State Party during the previous calendar year, starting with exports taking place during calendar year 1997. Reports for exports during calendar years 1997 and 1998 are due to the Department of Commerce August 16, 1999. Thereafter, annual reports of exports are due on February 13 of the following calendar year. The report should be on company letterhead or must clearly identify the reporting entity by name of company, complete address, name of contact person and telephone and fax numbers along with the following information for each export:

(i) Common Chemical Name;

(ii) Structural formula of the chemical;

(iii) CAS Registry Number;

(iv) Quantity involved in grams;

(v) Date of export;

(vi) Export license number;

(vii) Purpose (end-use) of export;

(viii) Name of recipient;

(ix) Complete address of recipient, including street address, city and country; and (x) Company identification number, once assigned by BXA.

(2) The report must be signed by a responsible party, certifying that the information provided in the annual report is, to the best of his/her knowledge and belief, true and complete.

(3) Send the report by fax to (703) 235-1481 or to the following address, for courier deliveries: Information Technology Team, Department of Commerce, Bureau of Export Administration, 1555 Wilson Boulevard, Suite 710, Arlington, VA 22209. Attn: "Annual Report of Schedule 1 Chemical Export".

§ 745.2 End-Use Certificate reporting requirements under the Chemical Weapons Convention.

Note: The End-Use Certificate requirement of this section does not relieve the exporter of any requirement to obtain a license from the Department of Commerce for the export of Schedule 2 or Schedule 3 chemicals subject to the Export Administration Regulations or from the Department of State for the export of Schedule 2 or Schedule 3 chemicals subject to the International Traffic in Arms Regulations.

(a)(1) No U.S. person, as defined in § 744.6(c) of the EAR, may export from the United States any Schedule 2 or Schedule 3 chemical identified in Supplement No. 1 to this part to

countries not party to the Chemical Weapons Convention (destinations *not* listed in Supplement No. 2 to this part) unless the U.S. person obtains from the consignee an End-Use Certificate issued by the government of the importing destination. This Certificate must be issued by the foreign government's agency responsible for foreign affairs or any other agency or department designated by the importing government for this purpose. Supplement No. 3 to this part includes foreign government entities responsible for issuing End-Use Certificates pursuant to this section. Additional foreign government departments or agencies responsible for issuing End-Use Certificates will be included in Supplement No. 3 to this part when known. End-Use Certificates may be issued to cover aggregate quantities against which multiple shipments may be made to a single consignee. An End-Use Certificate covering multiple shipments may be used until the aggregate quantity is shipped. End-Use Certificates must be

submitted separately from license applications.

(2) Submit a copy of the End-Use Certificate to the Department of Commerce by fax at (703) 235-1481 or to the following address no later than 7 days after the date of export, for mail and courier deliveries: Information Technology Team, Department of Commerce, Bureau of Export Administration, 1555 Wilson Boulevard, Suite 710, Arlington, VA 22209. Attn: CWC End-Use Certificate Report.

(b) The End-Use Certificate described in paragraph (a) of this section must state the following:

- (1) That the chemicals will be used only for purposes not prohibited under the Chemical Weapons Convention;
- (2) That the chemicals will not be transferred to other end-user(s) or end-use(s);
- (3) The types and quantities of chemicals;
- (4) Their specific end-use(s); and
- (5) The name(s) and complete address(es) of the end-user(s).

SUPPLEMENT NO. 1 TO PART 745—SCHEDULES OF CHEMICALS

	C.A.S. Registry No.
Schedule 1	
A. Toxic chemicals:	
(1) O-Alkyl ($\leq C_{10}$, incl. cycloalkyl) alkyl (Me, Et, n-Pr or i-Pr)-phosphonofluoridates e.g. Sarin: O-Isopropyl methylphosphonofluoridate	107-44-8
Soman: O-Pinacolyl methylphosphonofluoridate	96-64-0
(2) O-Alkyl ($\leq C_{10}$, incl. cycloalkyl) N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidocyanidates e.g. Tabun: O-Ethyl N,N-dimethyl phosphoramidocyanidate	77-81-6
(3) O-Alkyl (H or $\leq C_{10}$, incl. cycloalkyl) S-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonothiolates and corresponding alkylated or protonated salts e.g. VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate	50782-69-9
(4) Sulfur mustards:	
2-Chloroethylchloromethylsulfide	2625-76-5
Mustard gas: Bis(2-chloroethyl)sulfide	505-60-2
Bis(2-chloroethylthio)methane	63869-13-6
Sesquimustard: 1,2-Bis(2-chloroethylthio)ethane	3563-36-8
1,3-Bis(2-chloroethylthio)-n-propane	63905-10-2
1,4-Bis(2-chloroethylthio)-n-butane	142868-93-7
1,5-Bis(2-chloroethylthio)-n-pentane	142868-94-8
Bis(2-chloroethylthiomethyl)ether	63918-90-1
O-Mustard: Bis(2-chloroethylthioethyl)ether	63918-89-8
(5) Lewisites:	
Lewisite 1: 2-Chlorovinylchloroarsine	541-25-3
Lewisite 2: Bis(2-chlorovinyl)chloroarsine	40334-69-8
Lewisite 3: Tris(2-chlorovinyl)arsine	40334-70-1
(6) Nitrogen mustards:	
HN1: Bis(2-chloroethyl)ethylamine	538-07-8
HN2: Bis(2-chloroethyl)methylamine	51-75-2
HN3: Tris(2-chloroethyl)amine	555-77-1
(7) Saxitoxin	35523-89-8
(8) Ricin	9009-86-3
B. Precursors:	
(9) Alkyl (Me, Et, n-Pr or i-Pr) phosphonyldifluorides e.g. DF: Methylphosphonyldifluoride	676-99-3
(10) O-Alkyl (H or $\leq C_{10}$, incl. cycloalkyl) O-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonites and corresponding alkylated or protonated salts e.g. QL: O-Ethyl O-2-diisopropylaminoethyl methylphosphonite	57856-11-8
(11) Chlorosarin: O-Isopropyl methylphosphonochloridate	1445-76-7
(12) Chlorosoman: O-Pinacolyl methylphosphonochloridate	7040-57-5

SUPPLEMENT NO. 1 TO PART 745—SCHEDULES OF CHEMICALS—Continued

	C.A.S. Registry No.
Schedule 2	
A. Toxic chemicals:	
(1) Amiton: O,O-Diethyl S-[2-(diethylamino)ethyl] phosphorothiolate and corresponding alkylated or protonated salts	78-53-5
(2) PFIB: 1,1,3,3,3-Pentafluoro-2-(trifluoromethyl)-1-propene	382-21-8
(3) BZ: 3-Quinuclidinyl benzilate	6581-06-2
B. Precursors:	
(4) Chemicals, except for those listed in Schedule 1, containing a phosphorus atom to which is bonded one methyl, ethyl or propyl (normal or iso) group but not further carbon atoms, e.g. Methylphosphonyl dichloride	676-97-1
Dimethyl methylphosphonate	756-79-6
Exemption: Fonofos: O-Ethyl S-phenyl ethylphosphono-thiolothionate	944-22-9
(5) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides	
(6) Dialkyl (Me, Et, n-Pr or i-Pr) N,N-dialkyl (Me, Et, n-Pr or i-Pr)-phosphoramidates	
(7) Arsenic trichloride	7784-34-1
(8) 2,2-Diphenyl-2-hydroxyacetic acid	76-93-7
(9) Quinuclidine-3-ol	1619-34-7
(10) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethyl-2-chlorides and corresponding protonated salts	
(11) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-ols and corresponding protonated salts	
Exemptions: N,N-Dimethylaminoethanol and corresponding protonated salts	108-01-0
N,N-Diethylaminoethanol and corresponding protonated salts	100-37-8
(12) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-thiols and corresponding protonated salts	
(13) Thiodiglycol: Bis(2-hydroxyethyl)sulfide	111-48-8
(14) Pinacolyl alcohol: 3,3-Dimethylbutane-2-ol	464-07-3
Schedule 3	
A. Toxic chemicals:	
(1) Phosgene: Carbonyl dichloride	75-44-5
(2) Cyanogen chloride	506-77-4
(3) Hydrogen cyanide	74-90-8
(4) Chloropicrin: Trichloronitromethane	76-06-2
B. Precursors:	
(5) Phosphorus oxychloride	10025-87-3
(6) Phosphorus trichloride	7719-12-2
(7) Phosphorus pentachloride	10026-13-8
(8) Trimethyl phosphite	121-45-9
(9) Triethyl phosphite	122-52-1
(10) Dimethyl phosphite	868-85-9
(11) Diethyl phosphite	762-04-9
(12) Sulfur monochloride	10025-67-9
(13) Sulfur dichloride	10545-99-0
(14) Thionyl chloride	7719-09-7
(15) Ethyldiethanolamine	139-87-7
(16) Methyl-diethanolamine	105-59-9
(17) Triethanolamine	102-71-6

Supplement No. 2 to Part 745—States Parties to the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction

List of States Parties as of May 18, 1999

Albania
Algeria
Argentina
Armenia
Australia
Austria
Bahrain
Bangladesh
Belarus
Belgium
Benin
Bolivia
Bosnia-Herzegovina
Botswana

Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burundi
Cameroon
Canada
Chile
China
Cook Islands
Costa Rica
Cote d'Ivoire (Ivory Coast)
Croatia
Cuba
Cyprus
Czech Republic
Denmark
Ecuador
El Salvador
Equatorial Guinea
Ethiopia
Fiji

Finland
France
Gambia
Georgia
Germany
Ghana
Greece
Guinea
Guyana
Hungary
Iceland
India
Indonesia
Iran
Ireland
Italy
Japan
Jordan
Kenya
Korea (Republic of)
Kuwait
Laos (P.D.R.)

Latvia
 Lesotho
 Lithuania
 Luxembourg
 Macedonia
 Malawi
 Maldives
 Mali
 Malta
 Mauritius
 Mauritania
 Mexico
 Moldova (Republic of)
 Monaco
 Mongolia
 Morocco
 Namibia
 Nepal
 Netherlands
 New Zealand
 Niger
 Norway
 Oman
 Pakistan
 Panama
 Papua New Guinea
 Paraguay
 Peru
 Philippines
 Poland
 Portugal
 Qatar
 Romania
 Russian Federation
 Saint Lucia
 Saudi Arabia
 Senegal
 Seychelles
 Singapore
 Slovak Republic
 Slovenia
 South Africa
 Spain
 Sri Lanka
 Suriname
 Swaziland
 Sweden
 Switzerland
 Tajikistan
 Tanzania
 Togo
 Trinidad and Tobago
 Tunisia
 Turkey
 Turkmenistan
 United Kingdom
 Ukraine

United States
 Uruguay
 Uzbekistan
 Venezuela
 Vietnam
 Zimbabwe

Supplement No. 3 to Part 740—Foreign Government Agencies Responsible for Issuing End-Use Certificates Pursuant to § 745.2

Israel
 Chemical, Environment Technology Administration, Ministry of Industry & Trade, 30 Agron Street, Jerusalem 94190, Israel
 Contact: Josef Dancona, Deputy Director, Telephone: 972-2-6220193, Fax: 972-2-6241987
 Taiwan
 Industrial Development Bureau, Ministry of Economic Affairs, 41-3, Sinyi Road Sec 3, Taipei, Taiwan, ROC
 Contact: Ms. Yea-Ling Shiou, Telephone: 886-2-27541255, Ext. 2329

PART 748—[AMENDED]

19. Section 748.8 is amended by adding paragraph (q) to read as follows:

§ 748.8 Unique license application requirements.

(q) Exports of chemicals controlled for CW reasons by ECCN 1C350 to countries not listed in Supplement No. 2 to part 745 of the EAR.

20. Supplement No. 2 to part 748 is amended by adding paragraph (q) to read as follows:

Supplement No. 2 to Part 748—Unique License Application Requirements

(q) *Chemicals controlled for CW reasons under ECCN 1C350.* In addition to any supporting documentation required by part 748, you must also obtain from your consignee an End-Use Certificate for the export of chemicals controlled for CW reasons by ECCN 1C350 (except 1C350.a.20., a.24, and a.31) to non-States Parties (destinations not listed in Supplement No. 2 to part 745 of the EAR). See § 745.2 of the EAR.

In addition to the End-Use Certificate, you may still be required to obtain a Statement by Ultimate Consignee and Purchaser (Form BXA-711P) as support documentation. Consult §§ 748.9 and 748.11 of the EAR.

PART 758—[AMENDED]

21. Section 758.3 is amended by revising the phrase “that have the column identifier” in paragraph (h)(2) to read “that are controlled for “CW” reasons or that have the column identifier”.

22. Part 772 is amended by adding definitions of “Chemical Weapons Convention (CWC)” and “Organization for the Prohibition of Chemical Weapons (OPCW)” in alphabetical order to read as follows:

PART 772—[AMENDED]

* * * * *

Chemical Weapons Convention (CWC). Means “The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction”, opened for signature on January 13, 1993.

* * * * *

Organization for the Prohibition of Chemical Weapons (OPCW). Means the international organization, located in The Hague, Netherlands, that administers the Chemical Weapons Convention.

PART 774—[AMENDED]

23. In Supplement No. 1 to part 774 (the Commerce Control List), Category 1, is amended by revising ECCN 1C350 to read as follows:

1C350 Chemicals, that may be used as precursors for toxic chemical agents.

License Requirements

Reason for Control: CB, CW, AT

Control(s)	Country chart
CB applies to entire entry	CB Column 2
CW applies to 1C350.a.2, a.3, a.5, a.6, a.7, a.8, a.10, a.11, a.12, a.13, a.15, a.16, a.17, a.20, a.21, a.22, a.23, a.24, a.28, a.29, a.30, a.31, a.32, a.33, a.35, a.37, a.41, a.47, a.48, a.49, a.50, a.51, a.53, or a.54. For 1C350.a.20, a.24 and a.31, a license is required for CW reasons for all destinations, including Canada. For all other chemicals controlled for CW reasons, a license is required for export to countries not listed in Supplement No. 2 to part 745, unless an End-Use Certificate is obtained by the exporter. See § 742.18 of the EAR. Also, see § 745.2 of the EAR for End-Use Certificate requirements. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for CW reasons.	
AT applies to entire entry	AT Column 1

License Requirement Notes

1. *Sample Shipments:* Certain sample shipments of chemicals controlled under ECCN 1C350 may be made

without a license, as provided by the following:

a. Chemicals Not Eligible: The following CWC Schedule 1 chemicals are not eligible for sample shipments: 0-

Ethyl-2-diisopropylaminoethyl methylphosphonite (QL) (C.A.S. #57856-11-8), Ethylphosphonyl difluoride (C.A.S. #753-98-0), and

Methylphosphonyl difluoride (C.A.S. #676-99-3).

b. Countries Not Eligible: The following countries are *not* eligible to receive any sample shipments: Cuba, Iran, Iraq, Libya, North Korea, Sudan, Syria.

c. Sample Shipments: A license is not required for sample shipments when the cumulative total of these shipments does not exceed a 55-gallon container or 200 kg of each chemical to any one consignee per calendar year. Multiple sample shipments, in any quantity, not exceeding the totals indicated in this paragraph may be exported without a license, in accordance with the provisions of this Note 1. A consignee that receives a sample shipment under this exclusion may not resell, transfer, or reexport the sample shipment, but may use the sample shipment for any other legal purpose unrelated to chemical weapons. However, a sample shipment exported and received under this exclusion remains subject to all General Prohibitions including the end-use restriction described in § 744.4 of the EAR. Sample shipments of chemicals controlled for CW reasons to non-States Parties (destinations *not* listed in Supplement No. 2 to part 745 of the EAR) may not be made without first obtaining an End-Use Certificate, as described in § 745.2 of the EAR. If no End-Use Certificate is obtained pursuant to § 745.2 of the EAR, a license is required for sample shipments of chemicals controlled under ECCN 1C350 for CW reasons.

d. The exporter is required to submit a quarterly written report for shipments of samples made under this Note 1. The report must be on company letterhead stationery (titled "Report of Sample Shipments of Chemical Precursors" at the top of the first page) and identify the chemical(s), Chemical Abstract Service Registry (C.A.S.) number(s), quantity(ies), the ultimate consignee's name and address, and the date exported. The report must be sent to the U.S. Department of Commerce, Bureau of Export Administration, P.O. Box 273, Washington, DC 20044, Attn: "Report of Sample Shipments of Chemical Precursors".

2. *Mixtures*: Mixtures controlled by this entry that contain certain concentrations of precursor and intermediate chemicals are subject to the following licensing requirements:

a. A license is required, regardless of the concentrations in the mixture, for the following chemicals: 0-Ethyl-2-diisopropylaminoethyl methylphosphonite (QL) (C.A.S. #57856-11-8), Ethylphosphonyl difluoride (C.A.S. #753-98-0) and

Methylphosphonyl difluoride (C.A.S. #676-99-3);

b. A license is required when at least one of the following chemicals constitutes more than 10 percent of the weight of the mixture: Arsenic trichloride (C.A.S. #7784-34-1), Benzilic acid (C.A.S. #76-93-7), Diethyl ethylphosphonate (C.A.S. #78-38-6), Diethyl methylphosphonite (C.A.S. #15715-41-0), Diethyl-N,N-dimethylphosphoroamidate (C.A.S. #2404-03-7), N,N-Diisopropyl-beta-aminoethane thiol (C.A.S. #5842-07-9), N,N-Diisopropyl-2-aminoethyl chloride hydrochloride (C.A.S. #4261-68-1), N,N-Diisopropyl-beta-aminoethanol (C.A.S. #96-80-0), N,N-Diisopropyl-beta-aminoethyl chloride (C.A.S. #96-79-7), Dimethyl ethylphosphonate (C.A.S. #6163-75-3), Dimethyl methylphosphonate (C.A.S. #756-79-6), Ethylphosphonous dichloride [Ethylphosphinyl dichloride] (C.A.S. #1498-40-4), Ethylphosphonous difluoride [Ethylphosphinyl difluoride] (C.A.S. #430-78-4), Ethylphosphonyl dichloride (C.A.S. #1066-50-8), Methylphosphonous dichloride [Methylphosphinyl dichloride] (C.A.S. #676-83-5), Methylphosphonous difluoride [Methylphosphinyl difluoride] (C.A.S. #753-59-3), Methylphosphonyl dichloride (C.A.S. #676-97-1), Pinacolyl alcohol (C.A.S. #464-07-3), 3-Quinuclidinol (C.A.S. #1619-34-7), and Thiodyglycol (C.A.S. #111-48-8) (Related ECCN: 1C995);

c. A license is required when at least one of all other chemicals in the List of Items Controlled constitutes more than 25 percent of the weight of the mixture (related ECCN: 1C995); *and*

d. A license is not required under this entry for mixtures when the controlled chemical is a normal ingredient in consumer goods packaged for retail sale for personal use. Such consumer goods are classified as EAR99.

Note to Mixtures: Calculation of concentrations of AG-controlled chemicals:

a. Exclusion. No chemical may be added to the mixture (solution) for the sole purpose of circumventing the Export Administration Regulations;

b. Absolute Weight Calculation. When calculating the percentage, by weight, of components in a chemical mixture, include all components of the mixture, including those that act as solvents;

c. Example.
11% chemical listed in paragraph b. of Note 2.

39% chemical not listed in Note 2

50% Solvent

100% Mixture

11/100=11% chemical listed in paragraph b. of Note 2.

In this example, a license is required because a chemical listed in paragraph

b. of Note 2 constitutes more than 10 percent of the weight of the mixture.

3. *Compounds*. A license is not required under this entry for chemical compounds created with any chemicals identified in this entry, unless those compounds are also identified in this entry.

Technical Notes: 1. For purposes of this entry, a "mixture" is defined as a solid, liquid or gaseous product made up of two or more components that do not react together under normal storage conditions.

2. The scope of this control applicable to Hydrogen Fluoride (Item 25 in List of Items Controlled) includes its liquid, gaseous, and aqueous phases, and hydrates.

License Exceptions

LVS: N/A.

GBS: N/A.

CIV: N/A.

List of Items Controlled

Unit: Liters or kilograms, as appropriate.

Related Controls: 1C350.a.20, a.24, and a.31 are CWC Schedule 1 chemicals (see § 742.18 of the EAR). The U.S. Government must provide advance notification and annual reports to the OPCW of all exports of Schedule 1 chemicals. See §§ 742.18 and 745.1 of the EAR for notification and annual report requirements. See also ECCN 1C355. See 22 CFR part 121, Category XIV and § 121.7 for additional CWC Schedule 1 chemicals controlled by the Department of State.

Related Definitions: See § 770.2(k) of the EAR for synonyms for the chemicals listed in this entry.

Items:

- a. Precursor Chemicals, as follows:
- a.1. (C.A.S. #1341-49-7) Ammonium hydrogen fluoride;
 - a.2. (C.A.S. #7784-34-1) Arsenic trichloride;
 - a.3. (C.A.S. #76-93-7) Benzilic acid;
 - a.4. (C.A.S. #107-07-3) 2-Chloroethanol;
 - a.5. (C.A.S. #78-38-6) Diethyl ethylphosphonate;
 - a.6. (C.A.S. #15715-41-0) Diethyl methylphosphonite;
 - a.7. (C.A.S. #2404-03-7) Diethyl-N,N-dimethylphosphoroamidate;
 - a.8. (C.A.S. #762-04-9) Diethyl phosphite;
 - a.9. (C.A.S. #100-37-8) N,N-Diethylaminoethanol;
 - a.10. (C.A.S. #5842-07-9) N,N-Diisopropyl-beta-aminoethane thiol;
 - a.11. (C.A.S. #4261-68-1) N,N-Diisopropyl-beta-aminoethyl chloride hydrochloride;
 - a.12. (C.A.S. #96-80-0) N,N-Diisopropyl-beta-aminoethanol;
 - a.13. (C.A.S. #96-79-7), N,N-

<p>Diisopropyl-beta-aminoethyl chloride;</p> <p>a.14. (C.A.S. #108-18-9) Diisopropylamine;</p> <p>a.15. (C.A.S. #6163-75-3) Dimethyl ethylphosphonate;</p> <p>a.16. (C.A.S. #756-79-6) Dimethyl methylphosphonate;</p> <p>a.17. (C.A.S. #868-85-9) Dimethyl phosphite (dimethyl hydrogen phosphite);</p> <p>a.18. (C.A.S. #124-40-3) Dimethylamine;</p> <p>a.19. (C.A.S. #506-59-2) Dimethylamine hydrochloride;</p> <p>a.20. (C.A.S. #57856-11-8) O-Ethyl-2-diisopropylaminoethyl methyl phosphonite (QL);</p> <p>a.21. (C.A.S. #1498-40-4) Ethyl phosphonous dichloride [Ethyl phosphinyl dichloride];</p> <p>a.22. (C.A.S. #430-78-4) Ethyl phosphonous difluoride [Ethyl phosphinyl difluoride];</p> <p>a.23. (C.A.S. #1066-50-8) Ethyl phosphonyl dichloride;</p> <p>a.24. (C.A.S. #753-98-0) Ethyl phosphonyl difluoride;</p> <p>a.25. (C.A.S. #7664-39-3) Hydrogen fluoride;</p> <p>a.26. (C.A.S. #3554-74-3) 3-Hydroxyl-1-methylpiperidine;</p> <p>a.27. (C.A.S. #76-89-1) Methyl</p>	<p>benzilate;</p> <p>a.28. (C.A.S. #667-83-5) Methyl phosphonous dichloride [Methyl phosphinyl dichloride];</p> <p>a.29. (C.A.S. #753-59-3) Methyl phosphonous difluoride [Methyl phosphinyl difluoride];</p> <p>a.30. (C.A.S. #767-97-1) Methyl phosphonyl dichloride;</p> <p>a.31. (C.A.S. #676-99-3) Methyl phosphonyl difluoride;</p> <p>a.32. (C.A.S. #10025-87-3) Phosphorus oxychloride;</p> <p>a.33. (C.A.S. #10026-13-8) Phosphorus pentachloride;</p> <p>a.34. (C.A.S. #1314-80-3) Phosphorus pentasulfide;</p> <p>a.35. (C.A.S. #7719-12-2) Phosphorus trichloride;</p> <p>a.36. (C.A.S. #75-97-8) Pinacolone;</p> <p>a.37. (C.A.S. #464-07-3) Pinacolyl alcohol;</p> <p>a.38. (C.A.S. #151-50-8) Potassium cyanide;</p> <p>a.39. (C.A.S. #7789-23-3) Potassium fluoride;</p> <p>a.40. (C.A.S. #7789-29-9) Potassium bifluoride;</p> <p>a.41. (C.A.S. #1619-34-7) 3-Quinuclidinol;</p> <p>a.42. (C.A.S. #3731-38-2) 3-Quinuclidone;</p> <p>a.43. (C.A.S. #1333-83-1) Sodium</p>	<p>bifluoride;</p> <p>a.44. (C.A.S. #143-33-9) Sodium cyanide;</p> <p>a.45. (C.A.S. #7681-49-4) Sodium fluoride;</p> <p>a.46. (C.A.S. #1313-82-2) Sodium sulfide;</p> <p>a.47. (C.A.S. #10025-67-9) Sulfur monochloride;</p> <p>a.48. (C.A.S. #10545-99-0) Sulfur dichloride;</p> <p>a.49. (C.A.S. #111-48-8) Thiodiglycol;</p> <p>a.50. (C.A.S. #7719-09-7) Thionyl chloride;</p> <p>a.51. (C.A.S. #102-71-6) Triethanolamine;</p> <p>a.52. (C.A.S. #637-39-8) Triethanolamine hydrochloride;</p> <p>a.53. (C.A.S. #122-52-1) Triethyl phosphite; and</p> <p>a.54. (C.A.S. #121-45-9) Trimethyl phosphite.</p> <p>b. Reserved.</p> <p>24-25. In Supplement No. 1 to part 774 (the Commerce Control List), Category 1 is amended by revising ECCN 1C351 to read as follows:</p> <p>1C351 Human pathogens, zoonoses, and "toxins".</p> <p>License Requirements</p> <p><i>Reason for Control:</i> CB, CW, AT.</p>
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Control(s)

Country chart

CB applies to entire entry CB Column 1

CW applies to 1C351.d.5 and d.6. See § 742.18 of the EAR for licensing information pertaining to chemicals subject to restriction pursuant to the CWC. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for CW reasons.

AT applies to entire entry AT Column 1

License Exceptions

LVS: N/A.
 GBS: N/A.
 CIV: N/A.

List of Items Controlled

Unit: Liters or kilograms, as appropriate.

Related Controls: 1C351.d.5. and d.6 are CWC Schedule 1 chemicals (see § 742.18 of the EAR).

- a.7. Japanese encephalitis virus;
- a.8. Junin virus;

The U.S. Government must provide advance notification and annual reports to the OPCW of all exports of Schedule 1 chemicals. See § 743.2 of the EAR for notification procedures. See 22 CFR part 121, Category XIV and § 121.7 for additional CWC Schedule 1 chemicals controlled by the Department of State. All vaccines and "immunotoxins" are excluded from the scope of this entry. See also 1C991.

Related Definitions: (1) For the purposes of this entry "immunotoxin"

is defined as an antibody-toxin conjugate intended to destroy specific target cells (e.g., tumor cells) that bear antigens homologous to the antibody. (2) For the purposes of this entity "subunit" is defined as a portion of the "toxin".

Items:

- a. Viruses, as follows:
 - a.1. Chikungunya virus;
 - a.2. Congo-Crimean haemorrhagic fever virus;
 - a.3. Dengue fever virus;
 - a.4. Eastern equine encephalitis virus;
 - a.5. Ebola virus;
 - a.6. Hantaan virus;
 - a.9. Lassa fever virus;
 - a.10. Lymphocytic choriomeningitis virus;
 - a.11. Machupo virus;
 - a.12. Marburg virus;
 - a.13. Monkey pox virus;
 - a.14. Rift Valley fever virus;
 - a.15. Tick-borne encephalitis virus (Russian Spring-Summer encephalitis virus);
 - a.16. Variola virus;

- a.17. Venezuelan equine encephalitis virus;
- a.18. Western equine encephalitis virus;
- a.19. White pox; or
- a.20. Yellow fever virus.
- b. Rickettsiae, as follows:
 - b.1. Bartonella quintana (Rochalimea quintana, Rickettsia quintana);
 - b.2. Coxiella burnetii;
 - b.3. Rickettsia prowasecki; or
 - b.4. Rickettsia rickettsii.
- c. Bacteria, as follows:
 - c.1. Bacillus anthracis;
 - c.2. Brucella abortus;
 - c.3. Brucella melitensis;
 - c.4. Brucella suis;
 - c.5. Burkholderia mallei (Pseudomonas mallei);
 - c.6. Burkholderia pseudomallei (Pseudomonas pseudomallei);
 - c.7. Chlamydia psittaci;
 - c.8. Clostridium botulinum;
 - c.9. Francisella tularensis;
 - c.10. Salmonella typhi;
 - c.11. Shigella dysenteriae;
 - c.12. Vibrio cholerae;

- c.13. *Yersinia pestis*.
 d. "Toxins", as follows: and subunits thereof:
 d.1. Botulinum toxins;
 d.2. *Clostridium perfringens* toxins;
 d.3. Conotoxin;
 d.4. Microcystin (cyanoginisin);
 d.5. Ricin;
 d.6. Saxitoxin;
 d.7. Shiga toxin;
 d.8. *Staphylococcus aureus* toxins;
 d.9. Tetrodotoxin;
 d.10. Verotoxin; or
 d.11. Aflatoxins.

26. In Supplement No. 1 to part 774 (the Commerce Control List), Category 1 is amended by adding new ECCN 1C355 to read as follows:

1C355 Chemical Weapons Convention (CWC) Schedule 2 and 3 chemicals and families of chemicals, not controlled by ECCN 1C350 or by the Department of State under the ITAR.

License Requirements

Reason for Control: CW.

Control(s)

CW applies to entire entry. A license is required for CW reasons only to CWC non-States Parties (destinations *not* listed in Supplement No. 2 to part 745), unless an End-Use Certificate is obtained by the exporter (see § 742.18 of the EAR). See § 745.2 of the EAR for End-Use Certificate requirements, and the License Requirements Notes of this entry. Also note the export clearance requirements of § 758.3 of the EAR. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for CW reasons.

License Requirements Notes

1. Chemicals listed in this entry may be shipped NLR (No License Required) when destined to most CWC States Parties (countries listed in Supplement No. 2 to part 745). Also see License Requirement Note 3.

2. Chemicals listed in this entry may be shipped NLR when destined to most non-States Parties (destinations not listed in Supplement No. 2 to part 745) if supported by an End-Use Certificate described by § 745.2 of the EAR and if the ECCN is indicated on the Shipper's Export Declaration in the appropriate space as provided in § 758.3 of the EAR. Chemicals listed in this entry require a license when exported to non-States Parties if the export is not supported by an End-Use Certificate described by § 745.2 of the EAR.

3. Chemicals listed in this entry may not be shipped NLR if restrictions of other sections of the EAR apply (e.g., see the end-use and end-user restrictions of

part 744 of the EAR and the restrictions that apply to embargoed countries in part 746 of the EAR).

4. *Mixtures:* Mixtures controlled by this entry that contain certain concentrations of precursor and intermediate chemicals are subject to the following requirements:

a. Mixtures are controlled under this entry when containing at least one of the chemicals controlled under 1C355.a when the chemical constitutes more than 10 percent of the weight of the mixture.

b. Mixtures are controlled under this entry when containing at least one of the chemicals controlled under 1C355.b when the chemical constitutes more than 25 percent of the weight of the mixture.

c. Mixtures containing chemicals identified in this entry are not controlled by ECCN 1C355 when the controlled chemical is a normal ingredient in consumer goods packaged for retail sale for personal use. Such consumer goods are classified as EAR99.

Note to mixtures: Calculation of concentrations.

a. Exclusion. No chemical may be added to the mixture (solution) for the sole purpose of circumventing the Export Administration Regulations;

b. Absolute Weight Calculation. When calculating the percentage, by weight, of components in a chemical mixture, include all components of the mixture, including those that act as solvents;

c. Example.
 11% chemical listed in 1C355.a
 39% chemical not listed in 1C355.a
 50% Solvent
 100% Mixture
 $11/100 = 11\%$ chemical listed in 1C355.a

In this example, the mixture is controlled under this entry because a chemical listed in 1C355.a. constitutes more than 10 percent of the weight of the mixture.

5. *Compounds.* Compounds created with any chemicals identified in this ECCN 1C355 may be shipped NLR, unless those compounds are also identified in this entry.

Technical Notes: For purposes of this entry, a "mixture" is defined as a solid, liquid or gaseous product made up of two or more components that do not react together under normal storage conditions.

License Exceptions

LVS: N/A.
 GBS: N/A.
 CIV: N/A.

List of Items Controlled

Unit: Liters or kilograms, as appropriate.

Related Controls: See also ECCNs 1C350 and 1C351. See §§ 742.18 and

745.2 of the EAR for End-Use Certification requirements. See 22 CFR part 121, Category XIV and § 121.7 for chloropicrin (trichloronitromethane)(76-06-2) (Schedule 3). Mixtures containing chloropicrin (trichloronitromethane) that have been transferred to the Department of Commerce from the Department of State through a commodity jurisdiction determination are controlled under this entry unless exempt by paragraph 4.b. of Licensing Requirements Notes.

Related Definitions: N/A.

Items:

- a. CWC Schedule 2 chemicals:
 a.1. Toxic chemicals:
 a.1.a. PFIB: 1,1,3,3,3-Pentafluoro-2-(trifluoromethyl)-1-propene (382-21-8);
 a.1.b. [Reserved]
 a.2. Precursors:
 a.2.a. FAMILY: Chemicals except for those listed in Schedule 1, containing a phosphorus atom to which is bonded one methyl, ethyl, or propyl (normal or iso) group with no additional carbon atoms in the structure;

Note: 1C355.a.2.a does not control Fonofos: O-Ethyl S-phenyl

ethylphosphonothiolothionate (944-22-9).

- a.2.b. FAMILY: N,N-Dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides;
 a.2.c. FAMILY: Dialkyl (Me, Et, n-Pr or i-Pr) N,N-dialkyl (Me, Et, n-Pr, or i-Pr)-phosphoramidates;
 a.2.d. FAMILY: N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethyl-2-chlorides and corresponding protonated salts;
 a.2.e. FAMILY: N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-ols and corresponding protonated salts;

Note: 1C355.a.2.e. does not control N,N-Dimethylaminoethanol and corresponding protonated salts (108-01-0) or N,N-Diethylaminoethanol and corresponding protonated salts (100-37-8).

- a.2.f. FAMILY: N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-thiols and corresponding protonated salts;
 b. CWC Schedule 3 chemicals:
 b.1. Toxic chemicals:
 b.1.a. Phosgene: Carbonyl dichloride (75-44-5);
 b.1.b. Cyanogen chloride (506-77-4);
 b.1.c. Hydrogen cyanide (74-90-8).
 b.2. Precursors:
 b.2.a. Ethyldiethanolamine (139-87-7);
 b.2.b. Methyl-diethanolamine (105-59-9).
 b.3. Mixtures containing chloropicrin (trichloronitromethane)(76-06-2) transferred from the Department of State (see Related Controls).

27. In Supplement No. 1 to part 774 (the Commerce Control List), Category 1, is amended by revising the heading of ECCN 1E001 to read as follows:

1E001 "Technology" according to the General Technology Note for the "development" or "production" of items controlled by 1A001.b., 1A001.c., 1A002, 1A003, 1A005, 1A102, 1B or 1C (except 1C355, 1C980, 1C981, 1C982, 1C983, 1C984, 1C988, 1C991, 1C992, 1C993, 1C994 and 1C995).

* * * * *

28. In Supplement No. 1 to part 774 (the Commerce Control List), Category 1

is amended by adding new ECCN 1E355 to read as follows:

1E355 Technology for the production of Chemical Weapons Convention (CWC) Schedule 2 and 3 chemicals, as follows (see List of Items Controlled):

License Requirements

Reason for Control: CW, AT.

Control(s)

Country chart

SW applies to entire entry. A license is required for CW reasons to CWC non-States Parties (destinations not listed in Supplement No. 2 to part 745), except for Israel and Taiwan. See § 472.18 of the EAR. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for SW reasons.

AT applies to the entire entry AT Column 1

License Exceptions

TSR: N/A.

CIV: N/A.

List of Items Controlled

Unit: N/A.

Related Controls: N/A.

Related Definitions: N/A.

Items:

a. Technology for the production of the following CWC Schedule 2 toxic chemicals:

a.1. PFIB: 1,1,3,3,3-Pentafluoro-2-(trifluoromethyl)-1-propene (382-21-8);

a.2. [Reserved]

b. Technology for the production of the following CWC Schedule 3 toxic chemicals CWC:

b.1. Phosgene: Carbonyl dichloride (75-44-5);

b.2. Cyanogen chloride (506-77-4);

b.3. Hydrogen cyanide (74-90-8).

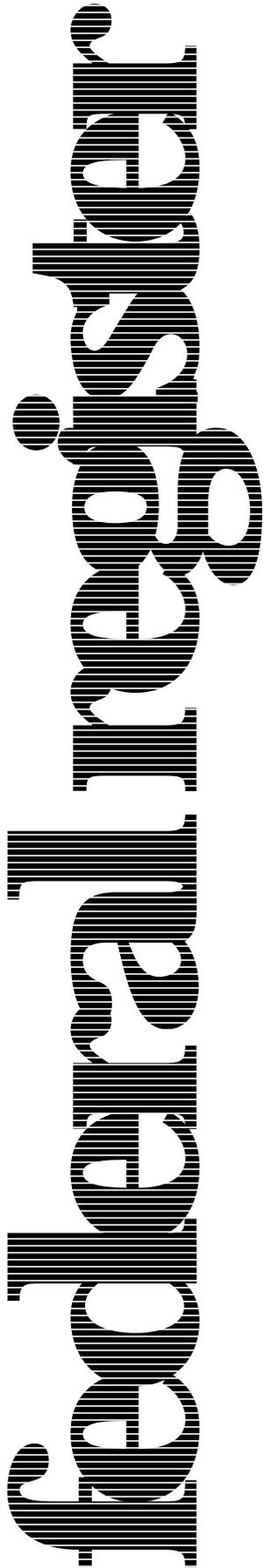
Dated: May 11, 1999.

R. Roger Majak,

Assistant Secretary for Export Administration.

[FR Doc. 99-12281 Filed 5-17-99; 8:45 am]

BILLING CODE 3510-33-P



Tuesday
May 18, 1999

Part VI

**Department of
Education**

34 CFR Part 76
State-Administered Programs; Proposed
Rule

DEPARTMENT OF EDUCATION**34 CFR Part 76****State-Administered Programs**

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the Education Department General Administrative Regulations (EDGAR) governing State-administered programs. These proposed regulations are necessary to implement a recent statutory change that affects all elementary and secondary education programs administered by the United States Department of Education (Department) under which the Secretary allocates funds to States on a formula basis. The proposed regulations would ensure that charter schools opening for the first time or significantly expanding their enrollment receive the funds for which they are eligible under these programs.

DATES: We must receive your comments on or before July 19, 1999.

ADDRESSES: Address all comments about these proposed regulations to Leslie Hankerson, U.S. Department of Education, 400 Maryland Avenue, SW., room 3C120, Washington, DC 20202-6140. If you prefer to send your comments through the Internet, use the following address: comments@ed.gov. You must include the term "Charter Schools" in the subject line of your electronic message.

If you want to comment on the information collection requirements, you must send your comments to the Office of Management and Budget at the address listed in the Paperwork Reduction Act section of this preamble. You may also send a copy of these comments to the Department representative named in this section.

FOR FURTHER INFORMATION CONTACT: Leslie Hankerson, U.S. Department of Education, 400 Maryland Avenue, SW., room 3C120, Washington, DC 20202-6140. Telephone: (202) 205-8524. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION:**Invitation To Comment**

We invite you to submit comments regarding these proposed regulations.

The Secretary is particularly interested in public comments on whether the Department should regulate on what constitutes an expansion of enrollment, or allow States the flexibility to define the term within the context of the State procedures established under these proposed regulations. The Secretary is also particularly interested in public comments on the practical administrative issues that States and local educational agencies (LEAs) will need to address when allocating funds to charter schools under these proposed regulations. One issue that arises under programs that provide for formula allocations by State educational agencies (SEAs) to LEAs, such as Part B of the Individuals with Disabilities Education Act (IDEA), for example, is whether additional guidance is needed on the range of permissible options available to SEAs in meeting their obligations under these proposed regulations. To ensure that your comments are fully considered in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

Under the Department's Principles for Regulating, we regulate only if absolutely necessary, and then only in the least burdensome manner necessary. These proposed regulations contain some provisions that either repeat statutory requirements, give the Department's interpretations of the statute, or describe permissible, rather than required, ways of implementing the statute. The Secretary particularly requests public comment on whether any or all of these provisions should be removed from the regulations and issued instead in the form of guidance.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the comment period, you may inspect all public comments about these proposed regulations in room 3C120, Federal Office Building 6, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid you may call (202) 205-8113 or (202) 260-9895. If you use a TDD, you may call the Federal Information Relay Service at 1-800-877-8339.

Background

Congress enacted the Charter School Expansion Act of 1998 (Act) on October 22, 1998. Among other things, the Act amended title X, part C of the Elementary and Secondary Education Act of 1965 (ESEA) and reauthorized the Public Charter Schools Program (PCSP) through fiscal year 2003. The Act also added a requirement under section 10306 of the ESEA that applies to all Department programs under which the Secretary allocates funds to States on a formula basis. Section 10306 requires the Secretary and States to take measures to ensure that eligible charter schools receive their commensurate share of funds under the covered programs in their first year of operation and in succeeding years when they expand their enrollment (20 U.S.C. 8065a).

These proposed regulations are necessary to ensure that States understand their responsibilities under section 10306 of the ESEA and take appropriate steps to fulfill those responsibilities. The Secretary encourages States to use these proposed regulations as a guide in meeting the requirements of section 10306 of the ESEA pending issuance of final regulations.

Summary of Proposed Provisions

The proposed provisions would amend Part 76 of EDGAR by redesignating subpart H as subpart I, and adding a new subpart H. For covered programs in which States and LEAs allocate funds by formula, this subpart would require States and LEAs to implement procedures that ensure that each charter school opening for the first time or significantly expanding its enrollment on or before November 1 of an academic year receives the full amount of funds for which it is eligible within five months of the date the charter school opens or significantly expands its enrollment. For each charter

school opening or significantly expanding its enrollment after November 1 but before February 1 of an academic year, this subpart would require States and LEAs to implement procedures that ensure that the charter school receives at least a *pro rata* portion of the funds for which the charter school is eligible within five months of the date the charter school opens or significantly expands its enrollment. For each charter school opening or significantly expanding its enrollment on or after February 1, this subpart would permit, but not require, States and LEAs to implement procedures to provide the charter school with a *pro rata* portion of the funds for which the charter school is eligible under a covered program. For covered programs in which States and LEAs award funds through a competitive process, this subpart would require States and LEAs to implement procedures that ensure that each eligible charter school scheduled to open during the academic year has a full and fair opportunity to compete to participate in the program.

In determining a charter school's eligibility to receive funds under a covered program during an academic year in which the charter school opens for the first time or significantly expands its enrollment, States and LEAs could not, under this subpart, rely on enrollment or eligibility data from a prior year, even if allocations to other LEAs or public schools are based on a prior year's data. These proposed regulations are based on statutory provisions that require eligibility to be determined based on current enrollment data of newly opened or expanded charter schools. This subpart would not apply to SEAs or LEAs that do not allocate funds or hold competitions among eligible applicants under an applicable covered program. Nor would this subpart have any effect on a charter school's eligibility to receive funds under a covered program during years in which the charter school is neither opening for the first time nor significantly expanding its enrollment. In those years, SEAs and LEAs should provide funds to charter schools meeting the statutory requirements for eligibility under the applicable program on the same basis as they provide funds to other LEAs and public schools. This subpart would override other Federal regulations to the extent that they are inconsistent with the provisions of this subpart.

General

Sections 76.785 through 76.787 describe the purpose of, define several

key terms, and identify the entities that would be governed by this subpart. This subpart would apply to all SEAs and LEAs that fund charter schools under a covered program, even if the State does not participate in the PCSP. Any State agency that is not an SEA but administers a covered program would also be required to comply with the provisions of this subpart that apply to SEAs. Examples of these State agencies include, but are not limited to, State vocational education agencies (Vocational Education Basic Grants and Tech-Prep Education), State agencies for higher education (Eisenhower Professional Development Grants), and the State agency that administers the Governor's Programs under the Department's Safe and Drug-Free Schools Program. Charter schools that are scheduled to open for the first time or significantly expand their enrollment during a given academic year, and wish to participate in a covered program in accordance with this subpart, would have to meet certain requirements.

The Secretary considers an expansion in enrollment to be significant when a charter school experiences a substantial increase in the number of eligible students under a covered program due to a significant event that is unlikely to occur on a regular basis, such as the addition of one or more grades or educational programs at the charter school.

Section 76.787 defines several key terms that are used in this subpart. *Charter school* has the same meaning as provided in the authorizing statute for the PCSP, title X, part C of the ESEA. A charter school that meets this definition and meets the eligibility requirements of the applicable covered program could receive funds under the program in accordance with the requirements of this subpart, regardless of whether the charter school receives funds under the PCSP. In order for a charter school to meet the ESEA definition, the charter school, among other things, would have to be located in a State with a law specifically authorizing the establishment of charter schools. This subpart defines *charter school LEA* as a charter school that is treated as an LEA for purposes of the applicable covered program. Under this definition, a charter school could be treated as an LEA for purposes of some covered programs but not others.

This subpart defines a *covered program* as any elementary or secondary education program administered by the Department in which the Secretary allocates funds to States on a formula basis. This definition includes the Department's major formula grant

programs under which States sub-allocate funds to LEAs by formula, such as Title I, Part A (Basic Grants to LEAs) of the ESEA; Part B (Grants to States and Preschool Grants) of IDEA; and Titles I and II (Basic Grants and Tech-Prep, respectively) of the Carl D. Perkins Vocational and Technical Education Act of 1998. The covered programs also include programs such as Safe and Drug-Free Schools, Even Start Family Literacy, Goals 2000, and Adult Education and Family Literacy, under which the Secretary allocates funds to States by formula but States award some or all subgrants to LEAs and other eligible applicants through a competition. The term covered program does not include formula grant programs, such as Impact Aid or Indian Education, under which the Secretary allocates funds directly to LEAs.

Local educational agency would have the same meaning in this subpart as it has in the authorizing statute for the applicable covered program. For covered programs authorized under the ESEA, for example, the Title XIV definition of LEA would apply; for covered programs authorized under Part B of IDEA, LEA would have the same meaning as provided in section 602 of IDEA and 34 CFR 300.18. Because both the ESEA and IDEA definitions of LEA rely heavily on State law, the Secretary generally defers to States in determining whether a charter school is an LEA for purposes of a covered program. The State determination must be consistent with Federal and State law, however, and may not violate any established State policies or practices. The Secretary urges States to develop clear policies for determining whether charter schools in the State are LEAs or public schools within an LEA for purposes of a covered program.

Responsibilities for Notice and Information

Sections 76.788 and 76.789 describe the responsibilities of the entities that would be governed by this subpart to provide notice and information. A charter school that is scheduled to open for the first time or significantly expand its enrollment during the academic year and wishes to receive funds under a covered program in accordance with this subpart would be required to provide its SEA (or other responsible State agency) or LEA, as appropriate, with at least 120 days' written notice of the date the charter school is scheduled to open or significantly expand its enrollment. An eligible charter school that fails to comply with this notice requirement still would receive its allocation under the applicable covered

program, but the responsible SEA or LEA would not necessarily be bound by the time periods specified in § 76.793. Unless the SEA or LEA receives actual notice of the date the charter school is scheduled to open or significantly expand its enrollment from another source (e.g., an authorized chartering agency) at least 120 days before that date, the SEA or LEA would be required only to make allocations to the eligible charter school within a reasonable period of time after the charter school opens or significantly expands its enrollment.

In order to receive funds under a covered program, a charter school must establish its compliance with all applicable program requirements on the same basis as other LEAs. Upon request, a charter school must also provide its SEA or LEA with any data or information that is readily available to the charter school and that the SEA or LEA believes will assist it in estimating the amount of funds the charter school may be eligible to receive under a covered program when the charter school actually opens or significantly expands its enrollment. An SEA or LEA might request, for example, pre-registration lists or enrollment data from the prior academic year. While an SEA or LEA could not require a charter school to create any new data or information prior to opening or significantly expanding its enrollment, once the charter school has opened or significantly expanded its enrollment, it would be required to provide the SEA or LEA with actual enrollment and eligibility data at a time reasonably required by the SEA or LEA. If a charter school fails to provide any required enrollment or eligibility data to its SEA or LEA, the SEA or LEA could withhold funds from the charter school until the charter school provides the data.

While enrollment or eligibility data from a prior year may be used to estimate a charter school's projected enrollment on or after the date the charter school opens or significantly expands its enrollment, in accordance with §§ 76.791(a) and 76.796(b), an SEA or LEA could not use a prior year's data to determine the charter school's eligibility to participate in a covered program or to make any required adjustments to allocations under a covered program. This subpart would not preclude an SEA or LEA, however, from relying on data from a prior year to determine the amount of funds a charter school that is not opening for the first time or significantly expanding its enrollment is eligible to receive under a covered program.

Once an SEA or LEA has received notice of the date a charter school is scheduled to open or significantly expand its enrollment, § 76.789 of this subpart would require the SEA or LEA to provide the charter school with timely and meaningful information about each covered program in which the charter school may be eligible to apply to participate. The SEA or LEA would be required to provide this information to the charter school, regardless of whether the charter school complies with the notice requirement in § 76.788(a), if the SEA or LEA receives actual notice of the date the charter school is scheduled to open or significantly expand its enrollment through some other means or source. In cases where the responsible SEA or LEA also serves as the authorized chartering agency, for example, the SEA or LEA is likely to have actual notice of the date the charter school is scheduled to open or significantly expand its enrollment, even if the charter school does not provide official notice in accordance with § 76.788(a).

Under this subpart, an SEA or LEA would be considered to have provided timely information to a charter school if the charter school receives the information well enough in advance to be able to take the necessary steps to apply to participate in the program, but not so far in advance that the information is of little or no use to the charter school. An SEA or LEA would be considered to have provided meaningful information to a charter school if the information is complete and in a format that is clear and understandable.

Allocation of Funds

Section 76.790 describes the circumstances under which SEAs and LEAs would have to comply with this subpart. In order for a charter school to receive funds from an SEA or LEA in accordance with this subpart, the charter school would have to (1) open for the first time or significantly expand its enrollment during the academic year; (2) meet the eligibility requirements of the applicable covered program; and (3) comply with § 76.788(a) (notice). In order to ensure that charter schools receive the funds for which they are eligible in accordance with this subpart, paragraph (b) of § 76.790 would permit SEAs and LEAs to reserve funds or make initial allocations to eligible charter schools based on estimates of the projected enrollment at the charter school on or after the date the charter school opens or significantly expands its enrollment.

Under § 76.791, the determination of whether a charter school is eligible to receive funds under a covered program must be based on actual enrollment or other eligibility data for the charter school on or after the date the charter school first opens or significantly expands its enrollment. For the year a charter school is opening or significantly expanding its enrollment, an SEA or LEA would be precluded from determining the charter school's eligibility to participate in a covered program on the basis of enrollment or eligibility data from a prior year, even if eligibility determinations for other LEAs and public schools under the program normally are based on data from a prior year. Thus, an SEA or LEA could not deny funding to an otherwise eligible charter school merely because the amount of funds LEAs or public schools are eligible to receive under the program is based on data from a prior year. Nor could an SEA or LEA deny funding to an otherwise eligible charter school merely because the charter school is not open or has not significantly expanded its enrollment as of the date the SEA or LEA makes allocations to other LEAs or public schools under the applicable covered program.

Section 76.792 would require SEAs and LEAs to implement procedures to ensure that eligible charter schools receive their commensurate share of funds under a covered program. Eligible charter schools that first open or significantly expand their enrollment on or before November 1 of an academic year would receive their full allocations under a covered program, and eligible charter schools that first open or significantly expand their enrollment between November 1 and February 1 would receive a *pro rata* share of funds. The *pro rata* amount would be based on the number of months during the academic year that the charter school will participate in the applicable program compared to the total number of months in the academic year. Although eligible charter schools that open on or after February 1 would not necessarily receive any funds under a covered program, this subpart would give States discretion to implement procedures to provide eligible charter schools in this category with a *pro rata* portion of funds.

The Secretary recognizes the potential administrative burden that the new statutory requirement may place on States and localities and, accordingly, intends to allow SEAs and LEAs maximum flexibility to develop procedures under this subpart that will enable them to comply with section

10306 of the ESEA in a manner that minimizes any disruption in State and local administration of covered programs. Examples of procedures SEAs and LEAs could implement include reserving an appropriate amount of funds from their total allocation under a covered program; reserving an appropriate amount of funds from the allocation to a particular LEA or public school based on the number of students from that LEA or public school who are expected to attend the charter school; and using, for charter school allocations, any carryover, reallocation, State or local administration, or other discretionary funds that may be available at the State and local levels.

Section 76.793 specifies the time periods within which SEAs and LEAs would be required to make allocations to eligible charter schools under this subpart. SEAs and LEAs with at least 120 days' notice of the date an eligible charter school is scheduled to open or significantly expand its enrollment would be required to make allocations to a charter school that first opens or significantly expands its enrollment on or before November 1 of an academic year within five months. SEAs and LEAs would also be required to make allocations to eligible charter schools that first open or significantly expand their enrollment between November 1 and February 1 of an academic year within five months. In accordance with § 76.788(a)(2), SEAs and LEAs would not be required to meet these deadlines if they do not receive actual notice of the date an eligible charter school is opening or significantly expanding its enrollment at least 120 days before the opening or expansion.

Section 76.794 addresses the applicability of this subpart to covered programs in which SEAs and LEAs award funds on a competitive basis. Because the ultimate decision on whether to fund an eligible applicant under a discretionary covered program lies within the discretion of the SEA or LEA, a charter school could be eligible to participate in a discretionary covered program and still not receive funding under the program. Accordingly, § 76.794(a) applies to competitive discretionary programs and would require SEAs and LEAs to provide charter schools that are scheduled to open for the first time or significantly expand their enrollment on or before the closing date of any competition with a full and fair opportunity to apply to participate in the program.

An SEA or LEA generally provides a charter school with a full and fair opportunity to participate in a discretionary covered program if it

provides the charter school with timely and meaningful information about the program, including notice of the dates of any upcoming competitions. When awarding funds under competitive discretionary programs, an SEA would not be required to provide a full and fair opportunity to apply to participate to any charter school LEA that is scheduled to open after the closing date of a subgrant competition. Nor would the SEA be required to delay a subgrant competition in order to allow a charter school LEA that has not yet opened to compete for funds under a covered program. Paragraph (b) of § 76.794 would specify that SEAs and LEAs would not be required to comply with the requirements of this subpart when distributing funds under discretionary covered programs in which the SEA or LEA does not hold a competition. When distributing funds under noncompetitive discretionary programs, however, SEAs and LEAs are encouraged to consider charter schools on an equitable basis with other LEAs and public schools.

Adjustments

Under § 76.796, an SEA or LEA that allocates more or fewer funds to a charter school than the amount for which the charter school is eligible to receive under a covered program would be required to make appropriate adjustments. While SEAs and LEAs would have the flexibility to make the adjustments during the same year if they choose, they would not be required to make any adjustments until the succeeding year when they make allocations under the applicable covered program.

Any required adjustments to allocations for a given academic year must be based on actual enrollment or eligibility data for the charter school on or after the date the charter school opens or significantly expands its enrollment. The adjustments may not be based on enrollment or eligibility data from a prior year, even if allocations to other LEAs and public schools under the applicable covered program are based on a prior year's data.

Applicability of This Subpart to LEAs

Section 76.799 clarifies that this subpart would apply to LEAs that are responsible for funding charter schools under covered programs on the same basis as the subpart would apply to SEAs. In accordance with existing Federal regulations applicable to the covered programs, the State would be directly responsible for ensuring that LEAs meet the requirements of section

10306 of the ESEA as well as this subpart.

Clarity of the Regulations

Executive Order 12866 and the President's Memorandum of June 1, 1998 on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A "section" is preceded by the symbol "\$" and a numbered heading; for example, § 76.785 *What is the purpose of this subpart?*)
- Could the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

Send any comments that concern how the Department could make these proposed regulations easier to understand to the person listed in the ADDRESSES section of the preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The small entities affected would be small LEAs and charter schools. The requirements in these proposed regulations would benefit charter schools by ensuring that they receive the Federal-to-State formula funds for which they are eligible within their first year of operation and in subsequent years when they significantly expand their enrollment. The flexibility in these proposed regulations would benefit charter schools by improving customer service, and States by easing the increased administrative burden that is anticipated as a result of the statutory requirement.

Paperwork Reduction Act of 1995

Sections 76.788, 76.789, 76.792, and 76.794 contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted copies of these sections to

the Office of Management and Budget (OMB) for its review.

Collection of Information: State-Administered Programs—Allocation of Funds to Charter Schools

These regulations would affect charter schools, LEAs, and SEAs (and other State agencies that administer covered programs). SEAs and LEAs will need and use the information to determine whether a charter school is eligible to receive funds under a covered program, to estimate the amount of funds the charter school is eligible to receive, and to ensure that the charter school receives that amount.

The Department estimates that SEAs will incur approximately 48.5 burden hours in the first year, and approximately 30.5 burden hours in subsequent years. The Department estimates the annual burden for charter schools and LEAs to be approximately 2.5 hours. The total annual reporting and recordkeeping burden for charter schools, SEAs, and LEAs after the first year will be determined by the number of eligible charter schools that open or significantly expand their enrollment each academic year.

If you want to comment on the information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for U.S. Department of Education. You may also send a copy of these comments to the Department representative named in the **ADDRESSES** section of this preamble.

We consider your comments on these proposed collections of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments

full consideration, it is important that OMB receives the comments within 30 days of publication. This does not affect the deadline for your comments to us on the proposed regulations.

Intergovernmental Review

Some of the programs that would be affected by these regulations are subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for these programs.

Assessment of Educational Impact

The Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at either of the following sites:

<http://ocfo.ed.gov/fedreg.htm>
<http://www.ed.gov/news.html>

To use the PDF you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC area at (202) 512-1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.access.gpo.gov/nara/index.html>.

(Catalog of Federal Domestic Assistance Number does not apply)

List of Subjects in 34 CFR Part 76

Administrative practice and procedure, Compliance, Eligibility, Grant administration, Reporting and recordkeeping requirements.

Dated: May 12, 1999.

Richard W. Riley,
Secretary of Education.

The Secretary proposes to amend part 76 of title 34 of the Code of Federal Regulations as follows:

PART 76—STATE-ADMINISTERED PROGRAMS

1. The authority citation for part 76 is revised to read as follows:

Authority: 20 U.S.C. 1221e-3, 3474, 6511(a), and 8065a, unless otherwise noted.

2. Subpart H of part 76 is redesignated as subpart I.

3. A new subpart H is added to part 76 to read as follows:

Subpart H—Allocation of Funds to Charter Schools

General

Sec.

- 76.785 What is the purpose of this subpart?
 76.786 What entities are governed by this subpart?
 76.787 What definitions apply to this subpart?

Responsibilities for Notice and Information

- 76.788 What are a charter school LEA's responsibilities under this subpart?
 76.789 What are an SEA's responsibilities under this subpart?

Allocation of Funds by State Educational Agencies

- 76.790 Under what circumstances must an SEA comply with the requirements of this subpart?
 76.791 On what basis does an SEA determine whether a charter school LEA that opens or significantly expands its enrollment is eligible to receive funds under a covered program?
 76.792 How does an SEA allocate funds to eligible charter school LEAs under a covered program in which the SEA awards subgrants on a formula basis?
 76.793 When is an SEA required to allocate funds to a charter school LEA under this subpart?
 76.794 How does an SEA allocate funds to charter school LEAs under a covered program in which the SEA awards subgrants on a discretionary basis?

Adjustments

- 76.796 What are the consequences of an SEA allocating more or fewer funds to a charter school LEA under a covered program than the amount for which the charter school LEA is eligible when the charter school LEA actually opens or significantly expands its enrollment?
 76.797 When is an SEA required to make adjustments to allocations under this subpart?

Applicability of This Subpart to Local Educational Agencies

- 76.799 Do the requirements in this subpart apply to LEAs?

Subpart H—Allocation of Funds to Charter Schools**General****§ 76.785 What is the purpose of this subpart?**

The regulations in this subpart implement section 10306 of the Elementary and Secondary Education Act of 1965 (ESEA), which requires States to take measures to ensure that each charter school in the State receives the funds under a covered program for which the charter school is eligible during its first year of operation and during subsequent years in which the charter school expands its enrollment.

(Authority: 20 U.S.C. 8065a)

§ 76.786 What entities are governed by this subpart?

The regulations in this subpart apply to—

(a) State educational agencies (SEAs) and local educational agencies (LEAs) that fund charter schools under a covered program, including SEAs and LEAs located in States that do not participate in the United States Department of Education's (Department) Public Charter Schools Program;

(b) State agencies that are not SEAs, if they are responsible for administering a covered program. State agencies that are not SEAs must comply with the provisions in this subpart that are applicable to SEAs; and

(c) Charter schools that are scheduled to open or significantly expand their enrollment during the academic year and wish to participate in a covered program.

(Authority: 20 U.S.C. 8065a)

§ 76.787 What definitions apply to this subpart?

For purposes of this subpart—

Charter school has the same meaning as provided in title X, part C of the ESEA.

Charter school LEA means a charter school that is treated as a local educational agency for purposes of the applicable covered program.

Covered program means an elementary or secondary education program administered by the Department under which the Secretary allocates funds to States on a formula basis.

Local educational agency has the same meaning for each covered program as provided in the authorizing statute for the program.

(Authority: 20 U.S.C. 8065a)

Responsibilities for Notice and Information**§ 76.788 What are a charter school LEA's responsibilities under this subpart?**

(a) *Notice.* (1) At least 120 days before the date a charter school LEA is scheduled to open or significantly expand its enrollment, the charter school LEA must provide its SEA with written notification of that date. (2)(i) The failure of an eligible charter school LEA to comply with paragraph (a)(1) of this section relieves the SEA of its obligation to comply with § 76.793, unless the SEA receives actual notice of the date the charter school LEA is scheduled to open or significantly expand its enrollment from another source at least 120 days before that date.

(ii) An SEA that does not receive at least 120 days' actual notice of the date an eligible charter school LEA is scheduled to open or significantly expand its enrollment must provide funds to the charter school LEA within a reasonable period of time after the charter school LEA opens or significantly expands its enrollment, consistent with the requirements of this subpart.

(b) *Information.* (1) In order to receive funds, a charter school LEA must—

(i) Provide to the SEA any available data or information that the SEA may reasonably require to assist the SEA in estimating the amount of funds the charter school LEA may be eligible to receive under a covered program; and

(ii) Establish its compliance with all applicable program requirements on the same basis as other LEAs.

(2) Once a charter school LEA has opened or significantly expanded its enrollment, the charter school LEA must provide actual enrollment and eligibility data to the SEA at a time the SEA may reasonably require. An SEA may withhold funds from a charter school LEA until the charter school LEA provides the SEA with the required actual enrollment and eligibility data.

(Authority: 20 U.S.C. 8065a)

§ 76.789 What are an SEA's responsibilities under this subpart?

Upon receiving notice, under § 76.788(a)(1) or otherwise, of the date a charter school LEA is scheduled to open or significantly expand its enrollment, an SEA must provide the charter school LEA with timely and meaningful information about each covered program in which the charter school LEA may be eligible to participate, including notice of any upcoming competitions under the program.

(Authority: 20 U.S.C. 8065a)

Allocation of Funds by State Educational Agencies**§ 76.790 Under what circumstances must an SEA comply with the requirements of this subpart?**

(a) An SEA must comply with the requirements of this subpart with respect to any charter school LEA that—

(1) Opens for the first time or significantly expands its enrollment during an academic year for which the State awards funds by formula or through a competition under a covered program;

(2) Meets the eligibility requirements of the applicable covered program; and

(3) Meets the requirements of § 76.788(a).

(b) In order to meet the requirements of this subpart, an SEA may allocate funds to, or reserve funds for, an eligible charter school LEA based on estimates of projected enrollment at the charter school LEA on or after the date the charter school LEA actually opens or significantly expands its enrollment.

(Authority: 20 U.S.C. 8065a)

§ 76.791 On what basis does an SEA determine whether a charter school LEA that opens or significantly expands its enrollment is eligible to receive funds under a covered program?

(a) For purposes of this subpart, an SEA must determine whether a charter school LEA is eligible to receive funds under a covered program based on actual enrollment or other eligibility data for the charter school LEA on or after the date the charter school LEA opens or significantly expands its enrollment. For the year the charter school LEA opens or significantly expands its enrollment, the eligibility determination may not be based on enrollment or eligibility data from a prior year, even if the SEA makes eligibility determinations for other LEAs under the program based on enrollment or eligibility data from a prior year.

(b) Except as provided in § 76.788(b)(2), a charter school LEA must receive the funds for which it is eligible in accordance with this subpart, even if the charter school LEA opens or significantly expands its enrollment after the date the SEA makes allocations to other LEAs under an applicable covered program.

(Authority: 20 U.S.C. 8065a)

§ 76.792 How does an SEA allocate funds to eligible charter school LEAs under a covered program in which the SEA awards subgrants on a formula basis?

(a) For each eligible charter school LEA that is scheduled to open or significantly expand its enrollment on or before November 1 of an academic

year, the SEA must implement procedures that ensure that the charter school LEA receives the full amount of funds for which the charter school LEA is eligible under each covered program.

(b) For each eligible charter school LEA that is scheduled to open or significantly expand its enrollment after November 1 but before February 1 of an academic year, the SEA must implement procedures that ensure that the charter school LEA receives at least a *pro rata* portion of the funds for which the charter school LEA is eligible under each covered program. The *pro rata* amount must be based on the number of months during the academic year the charter school LEA will participate in the program as compared to the total number of months in the academic year.

(c) For each eligible charter school LEA that is scheduled to open or significantly expand its enrollment on or after February 1 of an academic year, the SEA may implement procedures to provide the charter school LEA with a *pro rata* portion of the funds for which the charter school LEA is eligible under each covered program.

(Authority: 20 U.S.C. 8065a)

§ 76.793 When is an SEA required to allocate funds to a charter school LEA under this subpart?

Except as provided in §§ 76.788(a)(2) and 76.788(b)(2), for eligible charter school LEAs that open or significantly expand their enrollment before February 1 of an academic year, the SEA must allocate funds to the charter school LEA within five months of the date the charter school LEA opens or significantly expands its enrollment.

(Authority: 20 U.S.C. 8065a)

§ 76.794 How does an SEA award funds to charter school LEAs under a covered program in which the SEA awards subgrants on a discretionary basis?

(a) *Competitive programs.* (1) For covered programs in which the SEA awards subgrants on a competitive basis, the SEA must provide each eligible charter school LEA in the State that is scheduled to open on or before the closing date of any competition under the program a full and fair opportunity to apply to participate in the program.

(2) An SEA is not required to delay the competitive process in order to allow a charter school LEA that has not yet opened or significantly expanded its enrollment to compete for funds under a covered program.

(b) *Noncompetitive discretionary programs.* The requirements in this subpart do not apply to discretionary covered programs under which the SEA does not award subgrants through a competition.

(Authority: 20 U.S.C. 8065a)

Adjustments

§ 76.796 What are the consequences of an SEA allocating more or fewer funds to a charter school LEA under a covered program than the amount for which the charter school LEA is eligible when the charter school LEA actually opens or significantly expands its enrollment?

(a) An SEA that allocates more or fewer funds to a charter school LEA than the amount for which the charter school LEA is eligible, based on actual enrollment or eligibility data when the charter school LEA opens or significantly expands its enrollment, must make appropriate adjustments to the amount of funds allocated to the charter school LEA as well as to other LEAs under the applicable program.

(b) Any adjustments to allocations to charter school LEAs under this subpart must be based on actual enrollment or other eligibility data for the charter school LEA on or after the date the charter school LEA first opens or significantly expands its enrollment, even if allocations or adjustments to allocations to other LEAs in the State are based on enrollment or eligibility data from a prior year.

(Authority: 20 U.S.C. 8065a)

§ 76.797 When is an SEA required to make adjustments to allocations under this subpart?

The SEA must make any necessary adjustments to allocations under a covered program on or before the date the SEA allocates funds to LEAs under the program for the succeeding academic year.

(Authority: 20 U.S.C. 8065a)

Applicability of This Subpart to Local Educational Agencies

§ 76.799 Do the requirements in this subpart apply to LEAs?

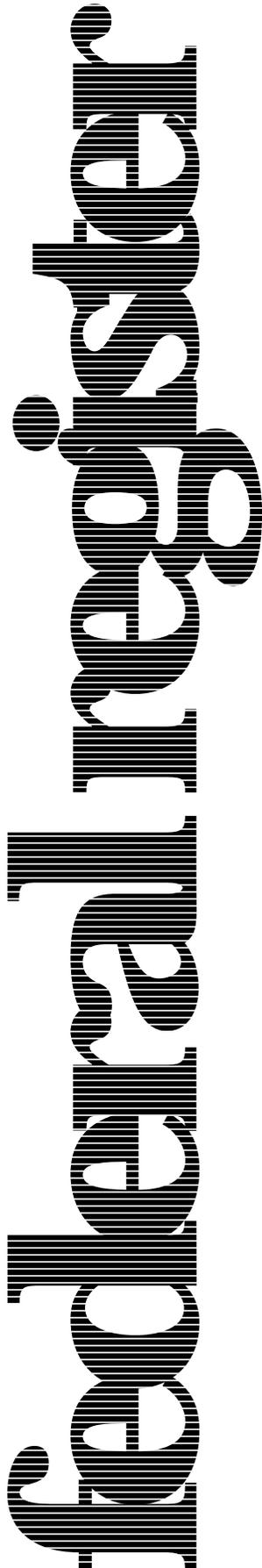
(a) Each LEA that is responsible for funding a charter school under a covered program must comply with the requirements in this subpart on the same basis as SEAs are required to comply with the requirements in this subpart.

(b) In applying the requirements in this subpart (except for §§ 76.785, 76.786, and 76.787) to LEAs, references to SEA (and State in §§ 76.794(a) and 76.796(b)), charter school LEA, and LEA must be read as references to LEA, charter school, and public school, respectively.

(Authority: 20 U.S.C. 8065a)

[FR Doc. 99-12456 Filed 5-17-99; 8:45 am]

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Tuesday
May 18, 1999

Part VII

**Department of
Transportation**

Federal Aviation Administration

**14 CFR Part 91
Airspace and Flight Operations
Requirements for Kodak Albuquerque
International Balloon Fiesta; Albuquerque,
NM; Proposed Rule**

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 91**

[Docket No. 29279; Notice No. 99-06]

RIN 2120-AG79

Airspace and Flight Operations Requirements for Kodak Albuquerque International Balloon Fiesta; Albuquerque, NM

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes a Special Federal Aviation Regulation (SFAR), applicable for the periods of October 2 through October 10, 1999, and October 7 through October 15, 2000, to establish a temporary flight restriction (TFR) area for the 1999 and 2000 Kodak Albuquerque International Balloon Fiestas (KAIBF). The FAA is proposing this action to manage aircraft operating in the vicinity of the KAIBF, and to prevent any unsafe congestion of sightseeing and other aircraft over and around the Balloon Fiesta launch site.

DATES: Comments must be received on or before July 19, 1999.

ADDRESSES: Comments on this document should be mailed or delivered, in duplicate, to: U.S. Department of Transportation Dockets, Docket No. 29279, 400 Seventh Street SW., Room Plaza 401, Washington, DC 20590. Comments also may be sent electronically to the following Internet address: 9-NPRM-CMTS@faa.gov. Comments may be filed and examined in Room Plaza 401 between 10 a.m. and 5 p.m. weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Steve Rohring, Airspace and Rules Division, ATA-400, Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8783.

SUPPLEMENTARY INFORMATION:**Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this document also are invited. Substantive comments should be accompanied by cost estimates. Comments must identify

the regulatory docket or notice number and be submitted in duplicate to the DOT Rules Docket address specified above.

All comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking, will be filed in the docket. The docket is available for public inspection before and after the comment closing date.

All comments received on or before the closing date will be considered by the Administrator before taking action on this proposed rulemaking. Comments filed late will be considered as far as possible without incurring expense or delay. The proposals in this document may be changed in light of the comments received.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this document must include a pre-addressed, stamped postcard with those comments on which the following statement is made: "Comments to Docket No. 29279" The postcard will be date stamped and mailed to the commenter.

Availability of NPRM

An electronic copy of this document may be downloaded using a modem and suitable communications software from the FAA regulations section of the FedWorld electronic bulletin board service (telephone: (703) 321-3339), the Government Printing Office (GPO)'s electronic bulletin board service (telephone: (202) 512-1661), or, if applicable, the FAA's Aviation Rulemaking Advisory Committee bulletin board service (telephone: (800) 322-2722 or (202) 267-5948).

Internet users may reach the FAA's web page at <http://www.faa.gov/avr/arm/nprm/nprm.htm> or the GPO's web page at <http://www.access.gpo.gov/nara> for access to recently published rulemaking documents.

Any person may obtain a copy of this document by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-9680. Communications must identify the notice number or docket number of this NPRM.

Persons interested in being placed on the mailing list for future rulemaking documents should request from the above office a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

The KAIBF will be held on October 2 through October 10, 1999, and the following year on October 7 through October 15, 2000, at a site 9 miles north of Albuquerque International Sunport, in Albuquerque, NM.

This proposed SFAR would establish a TFR area to provide for the safety of persons and property in the air and on the ground during the KAIBF. The proposed TFR area would restrict aircraft operations in a specified location; however, access to this area may be allowed with the appropriate air traffic control (ATC) authorization from the Albuquerque International Sunport Airport Traffic Control Tower (ATCT). ATC would retain the ability to manage aircraft through the TFR area in accordance with established ATC procedures.

Specifically, the proposed TFR area would be 9 miles north of the Albuquerque International Sunport ATCT and just west of Interstate Highway 25 (I-25). The TFR area would be centered on the Albuquerque Very High Frequency Omnidirectional Range/Tactical Air Navigation (VORTAC) 038° radial 14 distance measuring equipment (DME) fix. The area would encompass a 4-nautical-mile radius, extending from the surface up to but not including 8,000 feet mean sea level (MSL). The TFR area would be in effect between the hours of 0530 mountain daylight time MDT and 1200 MDT, and from 1600 MDT until 2200 MDT on October 2 through October 10, 1999, and October 7 through October 15, 2000. Unauthorized aircraft would be required to remain clear of this area during these times.

The location, dimensions, and effective times of the proposed TFR area would be published and disseminated via the Notice to Airmen (NOTAM) system.

Exceptions

The proposed SFAR would contain provisions to provide for flexible, efficient management and control of air traffic. ATC would have the authority to give priority to, or exclude from the requirements of the SFAR, certain flight operations dealing with or containing personnel or equipment for essential military, medical emergency, rescue, or law enforcement purposes, and transportation of the President, or heads of state.

Notice to Airmen Information

Time-critical aeronautical information that is of a temporary nature, or is not sufficiently known in advance to permit

publication on aeronautical charts or in other operational publications, receives immediate dissemination via the NOTAM system. All domestic operators planning flights to the KAIBF would need to pay particular attention to NOTAM D and Flight Data Center (FDC) NOTAM information.

NOTAM D contains information on airports, runways, navigational aids, radar services, and other information essential to flight. An FDC NOTAM contains regulatory information, such as amendments to aeronautical charts and restrictions to flight. FDC NOTAM and NOTAM D information also would be provided to international operators in the form of International NOTAMs. NOTAMs are distributed through the National Communications Center in Kansas City, Missouri, for transmission to all air traffic facilities having telecommunications access.

Pilots and operators would need to consult the monthly NOTAM Domestic/International publication. This publication contains FDC NOTAM and NOTAM D information. Special information, including graphics, would be published in the biweekly publication several weeks in advance of the KAIBF. For more detailed information concerning the NOTAM system, refer to the Aeronautical Information Manual "Preflight" section.

Other U.S. Laws and Regulations

Aircraft operators should understand clearly that the proposed SFAR is in addition to other laws and regulations of the United States. The SFAR would not waive or supersede any U.S. statute or obligation. When operating within the jurisdictional limits of the United States, operators of foreign aircraft must conform with all applicable requirements of U.S. Federal, State, and local governments. In particular, aircraft operators planning flights into the United States must be aware of and conform to the rules and regulations established by the:

1. U.S. Department of Transportation regarding flights entering the United States;
2. U.S. Customs Service, Immigration and other authorities regarding customs, immigrations, health, firearms, and imports/exports;
3. U.S. FAA regarding flight within or into U.S. airspace. This includes compliance with parts 91, 121 and 135 of Title 14, Code of Federal Regulations regarding operations into or within the United States through air defense identification zones, and compliance with general flight rules; and,

4. Airport management authorities regarding use of airports and airport facilities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has determined that there are no requirements for information collection associated with this proposed rule.

Compatibility With ICAO Standards

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these proposed regulations.

Regulatory Evaluation Summary

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic effect of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effect of regulatory changes on international trade. In conducting these analyses, the FAA has determined this proposed rule is not "a significant regulatory action" under section 3(f) of Executive Order 12866 and, therefore, is not subject to review by the Office of Management and Budget. This proposed rule is not considered significant under the regulatory policies and procedures of the Department of Transportation (44 FR 11034, February 26, 1979). This proposed rule would not have a significant impact on a substantial number of small entities and would not constitute a barrier to international trade. The FAA invites the public to provide comments and supporting data on the assumptions made in this evaluation. All comments received will be considered in the final regulatory evaluation.

This regulatory evaluation examined the costs and benefits of the proposed SFAR applicable for the periods October 2 through October 10, 1999, and October 7 through October 15, 2000. The SFAR proposes to establish a TFR area for the 1999 and 2000 KAIBF to be held in Albuquerque, NM. Because the impacts

of the proposed change are relatively minor, this economic summary constitutes the analysis, and no regulatory evaluation will be placed in the docket.

The major economic impact, in this case, would be the inconvenience of circumnavigation to operators who may want to operate in the area of the TFR. An aircraft operator could avoid the restricted airspace by flying over it or by circumnavigating the restricted airspace. Because the possibility of such occurrences is for a limited time and the restricted areas are limited in size, any circumnavigation costs would be negligible.

The benefits of the proposed TFR airspace would primarily be a lowered risk of midair collisions between aircraft and balloons due to increased positive control of TFR airspace. While benefits cannot be quantified, the benefits are commensurate with the small costs attributed to the temporary inconvenience of the flight restrictions for operators near the TFR area.

Initial Regulatory Flexibility Act Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes "as a principle of regulatory issuance, that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of businesses, organizations, and governmental jurisdictions subject to regulation." To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and an RFA is not required. The certification must include a statement providing the factual basis for this determination and the reasoning should be clear.

The major economic impact, in this case, would be the inconvenience of circumnavigation to operators who may

want to operate in the area of the TFR. An aircraft operator could avoid the restricted airspace by flying over it or by circumnavigating the restricted airspace. Because the possibility of such occurrences is for a limited time and the restricted areas are limited in size, any circumnavigation costs would be negligible.

Accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FAA certifies that this rule would not have a significant economic impact on a substantial number of small entities. The FAA solicits comments from affected entities with respect to this finding and determination.

International Trade Impact Analysis

The provisions of this proposed rule would have little or no impact on trade for U.S. firms doing business in foreign countries and foreign firms doing business in the United States.

Federalism Implications

The regulation proposed herein would not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposed regulation would not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), codified in 2 U.S.C. 1501–1571, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed “significant intergovernmental mandate.” A “significant intergovernmental mandate” under the Act is any provision in a Federal agency regulation that would impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of \$100 million (adjusted annually for inflation) in any one year. Section 203 of the Act, 2 U.S.C. 1533, which supplements

section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This proposed rule does not contain a Federal intergovernmental or private sector mandate that exceeds \$100 million in any one year.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental assessment or environmental impact statement. In accordance with FAA Order 1050.1D, this rulemaking action qualifies for a categorical exclusion.

This proposed action would establish a TFR area for safety purposes and would curtail or limit certain aircraft operations within a designated area on defined dates and times. Additionally, this proposed action would be temporary in nature and effective only for the dates and times necessary to provide for the management of air traffic operations and the protection of participants and spectators on the ground. ATC would retain the ability to direct aircraft through the restricted area in accordance with normal traffic flows. The FAA has determined that the proposed establishment of a TFR area would have minimal impact on ATC operations.

Further, this action would reduce aircraft activity in the vicinity of the Balloon Fiesta by restricting aircraft operations. There would be fewer aircraft operations in the vicinity of the Balloon Fiesta than would occur if the TFR area were not in place, and noise levels associated with that greater aircraft activity would also be reduced. Additionally, aircraft avoiding the TFR area would not be routed over any particular area. This action would not, therefore, result in any long-term action that would routinely route aircraft over noise-sensitive areas. For the reasons stated above, the FAA concludes that this proposed rule would not significantly affect the quality of the human environment.

Energy Impact

The energy impact of the notice has been assessed in accordance with the Energy Policy and Conservation Act (EPCA), Pub. L. 94–163, and FAA Order

1053.1. It has been determined that the notice is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 14 CFR Part 91

Air traffic control, Aircraft, Airports, Aviation safety.

The Proposed Special Federal Aviation Regulation (SFAR)

In consideration of the foregoing, the Federal Aviation Administration proposes to amend part 91 of Title 14, Code of Federal Regulations as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(g), 1155, 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, articles 12 and 29 of the Convention on International Civil Aviation (61 stat. 1180).

2. Amend part 91 by adding Special Federal Aviation Regulation No. [Insert SFAR No.] to read as follows:

SFAR No. [XXX]-Airspace and Flight Operations Requirements for the 1999 and 2000 Kodak Albuquerque International Balloon Fiestas, Albuquerque, NM

1. *General.* (a) Each person shall be familiar with all Notices to Airmen (NOTAMs) issued pursuant to this SFAR and all other available information concerning that operation before conducting any operation into or out of an airport or area specified in this SFAR or in NOTAMs pursuant to this SFAR. In addition, each person operating an international flight that will enter the United States shall be familiar with any international NOTAMs issued pursuant to this SFAR. NOTAMs are available for inspection at operating Federal Aviation Administration air traffic facilities and regional air traffic division offices.

(b) Notwithstanding any provision of Title 14, Code of Federal Regulations, no person may operate an aircraft contrary to any restriction procedure specified in this SFAR, or through a NOTAM issued pursuant to this SFAR, or by the Administrator.

(c) As conditions warrant, the Administrator is authorized to—

(1) Restrict, prohibit, or permit IFR/VFR (instrument flight rules/visual flight rules) operations in the temporary flight restricted area designated in this SFAR or in a NOTAM issued pursuant to this SFAR;

(2) Give priority to or exclude the following flights from provisions of this

SFAR and NOTAMs issued pursuant to this SFAR:

- (i) Essential military.
- (ii) Medical and rescue.
- (iii) Presidential and Vice

Presidential.

(iv) Flights carrying visiting heads of state.

(v) Law enforcement and security.

(vi) Flights authorized by the Director, Air Traffic Service.

(d) For security purposes, the Administrator may issue NOTAMs during the effective period of this SFAR to cancel or modify provisions of this SFAR and NOTAMs issued pursuant to this SFAR if such action is consistent with the safe and efficient use of

airspace and the safety and security of persons and property on the ground as affected by air traffic.

2. *Temporary Flight Restriction.* At the following location, flight is restricted during the indicated dates and times: That airspace within a 4-nautical-mile radius centered on the Albuquerque Very High Frequency Omnidirectional Range/Tactical Air Navigation (VORTAC) 038° radial 14 distance measuring equipment (DME) fix from the surface up to but not including 8,000 feet mean sea level unless otherwise authorized by Albuquerque Airport Traffic Control Tower.

3. *Dates and Times of Designation.* (a) October 2 through October 10, 1999, and October 7 through October 15, 2000, from 0530 MDT until 1200 MDT.

(b) October 2 through October 10, 1999, and October 7 through October 15, 2000, from 1600 MDT until 2200 MDT.

4. *Expiration.* This Special Federal Aviation Regulation expires on October 16, 2000.

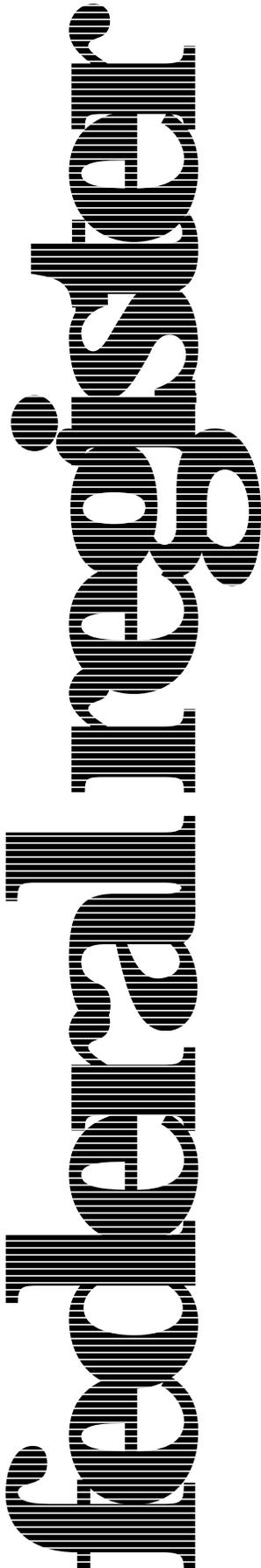
Issued in Washington, DC, on May 6, 1999.

Reginald C. Matthews,

Acting Program Director, Air Traffic Airspace Management.

[FR Doc. 99-12517 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-P



Tuesday
May 18, 1999

Part VIII

**Department of
Justice**

Bureau of Prisons

**28 CFR Part 540
Visiting Regulations: Prior Relationship;
Proposed Rule**

DEPARTMENT OF JUSTICE**Bureau of Prisons****28 CFR Part 540**

[BOP-1082-P]

RIN 1120-AA77

Visiting Regulations: Prior Relationship

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed Rule.

SUMMARY: In this document the Bureau of Prisons is proposing to revise its visiting regulations to require that regular visiting privileges at all institutions ordinarily will be extended to friends and associates only when the relationship had been established prior to confinement. This requirement is currently applicable at Medium Security Level, High Security Level, and Administrative institutions, but not at Low and Minimum Security Level institutions. The purpose of this revision is to provide for uniformity of visiting procedures for all security levels and to maintain the security and good order of the institution while continuing to afford inmates with reasonable and equitable access to visiting. Because the prior relationship requirement is to apply to regular visitors, the Bureau is also clarifying in its regulations the distinction between regular and special visitors.

DATES: Comments due by July 19, 1999.**ADDRESSES:** Rules Unit, Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 20534.**FOR FURTHER INFORMATION CONTACT:** Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514-6655.**SUPPLEMENTARY INFORMATION:** The Bureau of Prisons is proposing to amend its regulations on visiting (28 CFR part 540, subpart D). A final rule on this subject was published in the **Federal Register** on June 30, 1980 (45 FR 44232), and was amended on July 18, 1986 (51 FR 26127), February 1, 1991 (56 FR 4159), and July 21, 1993 (58 FR 39095).

The Bureau of Prisons encourages visiting by family, friends, and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members or others in the community. Currently, Bureau of Prisons regulations provide that for Medium Security Level, High Security Level, and Administrative institutions, regular visiting privileges are extended to friends and associates having an

established relationship with the inmate prior to confinement. This requirement for a prior established relationship does not currently extend to inmates confined in Minimum Security Level and Low Security Level institutions.

As part of a general review of security measures at Bureau institutions, the Bureau is proposing to require that the regular visiting privilege shall ordinarily be extended to friends and associates having a prior established relationship with the inmate at all Bureau institutions, including Minimum Security Level and Low Security Level institutions.

Exceptions to the prior relationship rule may continue to be made, particularly for inmates without other visitors, provided the proposed visitor is reliable and poses no threat to the security or the good order of the institutions.

By restricting visits from people who have no prior established relationship with inmates, the Bureau is also ensuring that inmates who do have established prior relationships with their visitors will have reasonable and equitable access to visiting.

The requirement for the prior relationship is not intended to affect visiting for special purposes. In order to emphasize the Bureau's intentions in this regard, the Bureau is amending the introductory text governing regular visitors (§ 540.44) to include a cross reference to the requirements for special visitors. Existing provisions in §§ 540.45 through 540.48 pertaining to business visits, consular visits, visits from representatives of the community, and special visits have been reorganized and revised in a new § 540.45 entitled "Qualification as special visitor," with cross-references to attorney and media visits in new §§ 540.46 and 540.47. As a consequence of making the distinction between regular visitors and special visitors more clear, the Bureau is also amending the section on procedures (§ 540.51) to note that necessary background investigations for special visitors are processed differently from background investigations for regular visitors.

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., HOLC Room 754, Washington, DC 20534. Comments received during the comment period will be considered before final action is taken. Comments received after the expiration of the comment period will be considered to the extent practicable. All comments received remain on file

for public inspection at the above address. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

Executive Order 12866

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined not to constitute "significant regulatory actions" under section 3(f) of Executive Order 12866 and, accordingly, it was not reviewed by OMB.

Executive Order 12612

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or

on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Plain Language Instructions

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Roy Nanovic at the address listed above.

List of Subjects in 28 CFR Part 540

Prisoners.

Kathleen Hawk Sawyer,

Director, Bureau of Prisons.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(p), part 540 in subchapter C of 28 CFR, chapter V, is proposed to be amended as set forth below.

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 540—CONTACT WITH PERSONS IN THE COMMUNITY

1. The authority citation for 28 CFR part 540 continues to read as follows:

Authority: 5 U.S.C. 301, 551, 552a; 18 U.S.C. 1791, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

2. In § 540.44, the section heading, the introductory text and paragraph (c) are revised to read as follows:

§ 540.44 Qualification as regular visitor.

An inmate desiring to have regular visitors must submit a list of proposed visitors to the designated staff. See § 540.45 for qualification as special visitor. Staff are to compile a visiting list for each inmate after suitable investigation in accordance with § 540.51(b). The list may include:

* * * * *

(c) *Friends and associates.* The visiting privilege ordinarily will be extended to friends and associates having an established relationship prior to confinement, unless such visits could reasonably create a threat to the security and good order of the institution. Exceptions to the prior relationship rule may be made, particularly for inmates

without other visitors, when it is shown that the proposed visitor is reliable and poses no threat to the security or good order of the institution.

* * * * *

3. Section 540.45 is revised to read as follows:

§ 540.45 Qualification as special visitor.

Persons in the categories listed in this section may qualify as special visitors rather than as regular visitors. Visits by special visitors ordinarily are for a specific purpose and ordinarily are not of a recurring nature. Except as specified, the conditions of visiting for special visitors are the same as for regular visitors.

(a) *Business visitor.* Except for pretrial inmates, an inmate is not permitted to engage actively in a business or profession. An inmate who was engaged in a business or profession prior to commitment is expected to assign authority for the operation of such business or profession to a person in the community. Pretrial inmates may be allowed special visitors for the purpose of protecting the pretrial inmate's business interests. In those instances where an inmate has turned over the operation of a business or profession to another person, there still may be an occasion where a decision must be made which will substantially affect the assets or prospects of the business. The Warden accordingly may permit a special business visit in such cases. The Warden may waive the requirement for the existence of an established relationship prior to confinement for visitors approved under this paragraph.

(b) *Consular visitors.* When it has been determined that an inmate is a citizen of a foreign country, the Warden must permit the consular representative of that country to visit on matters of legitimate business. The Warden may not withhold this privilege even though the inmate is in disciplinary status. The requirement for the existence of an established relationship prior to confinement does not apply to consular visitors.

(c) *Representatives of community groups.* The Warden may approve visits on a recurring basis to representatives from community groups (for example, civic, volunteer, or religious organizations) who are acting in their official capacity. These visits may be for

the purpose of meeting with an individual inmate or with a group of inmates. The requirement for the existence of an established relationship prior to confinement for visitors does not apply to representatives of community groups.

(d) *Clergy, former or prospective employers, sponsors, and parole advisors.* Visitors in this category ordinarily provide assistance in release planning, counseling, and discussion of family problems. The requirement for the existence of an established relationship prior to confinement for visitors does not apply to visitors in this category.

4. Section 540.46 is revised to read as follows:

§ 540.46 Attorney visits.

Requirements for attorney visits are governed by the provisions on inmate legal activities (see §§ 543.12 through 543.16 of this chapter). Provisions pertinent to attorney visits for pretrial inmates are contained in § 551.117 of this chapter.

5. Section 540.47 is revised to read as follows:

§ 540.47 Media visits.

Requirements for media visits are governed by the provisions on contact with news media (see subpart E of this part). A media representative who wishes to visit outside his or her official duties, however, must qualify as a regular visitor or, if applicable, a special visitor.

§ 540.48 [Removed and reserved]

6. Section 540.48 is removed and reserved.

7. In § 540.51, paragraphs (c) through (g) are redesignated as paragraphs (d) through (h), and a new paragraph (c) is added to read as follows:

§ 540.51 Procedures.

* * * * *

(c) *Verification of special visitor credentials.* Staff must verify the qualifications of special visitors. Staff may request background information and official assignment documentation from the potential visitor for this purpose.

* * * * *

[FR Doc. 99–12501 Filed 5–17–99; 8:45 am]

BILLING CODE 4410–05–P

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This is a continuing list of public bills from the current session of Congress which

have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202-523-6641. This list is also available online at <http://www.nara.gov/fedreg>.

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S. 453/P.L. 106-27

To designate the Federal building located at 709 West 9th Street in Juneau, Alaska, as the "Hurrff A. Saunders Federal Building". (May 13, 1999; 113 Stat. 52)

S. 460/P.L. 106-28

To designate the United States courthouse located at 401 South Michigan Street in South Bend, Indiana, as the "Robert K. Rodibaugh United States Bankruptcy Courthouse". (May 13, 1999; 113 Stat. 53)

Last List May 7, 1999

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